

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

TAXPAYERS OF MICHIGAN
AGAINST CASINOS, and
LAURA BAIRD,

Plaintiffs-Appellants,

v.

THE STATE OF MICHIGAN,

Defendant-Appellee,
and

NORTH AMERICAN SPORTS
MANAGEMENT COMPANY, INC., IV,
and GAMING ENTERTAINMENT, LLC,

Intervening Defendant-Appellees.

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL - AMICUS CURIAE
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(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)**

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**THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE
CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER
STATE GOVERNMENTAL ACTION IS INVALID**

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Pursuant to MCR 7.301(A)(2), this Court has jurisdiction over the Taxpayers of Michigan Against Casinos' ("TOMAC") Application for Leave to Appeal from the November 12, 2002, Court of Appeals' decision – which reversed the Ingham County Circuit Court's decision – granting the State of Michigan's Motion for Summary Disposition and dismissing TOMAC's case against the State and the other intervening defendants. Pursuant to MCR 7.306(C), this Court may consider this Brief by the *Amicus*, the Grand Rapids Area Chamber of Commerce, which addresses and is limited to the issues raised by the parties.

STATEMENT OF RELIEF SOUGHT

The Grand Rapids Area Chamber of Commerce (“the Chamber”) joins the Plaintiff-Appellant, Taxpayers of Michigan Against Casinos, in requesting that this Court overturn the Court of Appeals’ November 12, 2002 decision as unsupported by fact, law or public policy. More particularly, the Chamber seeks an order from this Court providing that the Indian Gaming Regulatory Act does not pre-empt Michigan Law regarding the States ability to regulate gambling on tribal land, and that the use of the resolution process to authorize Indian gaming compacts violates Article 4, § 22 of Michigan’s Constitution.

QUESTIONS PRESENTED FOR REVIEW

1. **Is the Legislature's Use of Resolutions to Adopt the Gaming Compacts Contrary to Michigan's Public Policy Disfavoring Gambling Inappropriate and Unconstitutional Since Decisions of that Nature Must be Resolved Through the Introduction and Passage of Bills?**

The Court of Appeals answered: No.

The Trial Court answered: Yes.

TOMAC answers: Yes.

State and Interveners answers: No.

Amicus GRACC Yes.

2. **Is Michigan's Right to Regulate Gambling on Indian Lands Through Compacts Pre-Empted by IGRA?**

The Court of Appeals answered: Yes.

The Trial Court answered: No.

TOMAC answers: No.

State and Interveners answers: Yes.

Amicus GRACC No.

3. **Is it a Violation of the Michigan Constitution's Separation of Powers for the Michigan Legislature to Give the Governor of Michigan *Carte Blanche* Authority to Amend Gambling Compacts with Indian Tribes Without Approval from the Legislature?**

The Court of Appeals answered: This issue is not ripe for appellate review.

The Trial Court answered: Yes.

TOMAC answers: Yes.

State and Interveners answers: No.

Amicus GRACC Yes.

4. **Must a Legislative Act of Local Application that Purports to Authorize Casino Gambling in Four Particular Michigan Communities Comply with Article IV, Section 29, of Michigan's Constitution, Which Specifies the Procedure for Passing "Local Acts"?**

The Court of Appeals answered: No.

The Trial Court answered: No.

TOMAC answers: Yes.

State and Interveners answers: No.

Amicus GRACC Yes.

INTRODUCTION

When it drafted and submitted its *Motion for Leave to File Brief Amicus Curiae* just six months ago, the Grand Rapids Area Chamber of Commerce (“the Chamber” or “GRACC”) argued that “No one could predict that the use of the resolution process to approve Indian gaming compacts in 1998 would – in a matter of four years – make a resolution more powerful than a legislative act passed in 2002.” The Chamber also argued that, by delegating unfettered power to negotiate the Indian gaming compacts to the Executive Branch, the Legislature violated the separation of powers that is a principal guiding foundation of the Michigan Constitution.

On July 22, 2003, Governor Granholm’s unilateral execution of a purported amendatory tribal-state agreement with one of the tribes involved in this litigation brought both of the above issues out of the realm of hypothesis and into reality. Changing the payment terms of the initial compact without legislative authority, the Governor’s actions reveal that – particularly in these trying economic times when the thought of new revenue bases *regardless of the source* is understandably tempting to a government seeking to balance its budget – the Constitutional safeguards that require that changes to the laws of this State have to undergo thoughtful consideration and debate mandate that the adoption of Indian gaming compacts must be submitted through appropriate legislative channels, and are *not* appropriate subjects for the casual and informal process utilized to pass resolutions.¹ That is why this Court must reverse the Court of Appeals’ decision upholding the unfettered expansion of the resolution process into the normal legislative process.

¹ Mindful of this Court’s time constraints, and to avoid unnecessary duplication of arguments, and with the knowledge that TOMAC and Senator Sikkema’s *amicus* briefs will focus on the Governor’s recent amendments to existing tribal-state agreements, the Chamber will defer to the arguments set forth in those briefs regarding the propriety of the Governor’s actions.

I. THE LEGISLATURE'S RECENTLY EXPANDED USE OF THE RESOLUTION PROCESS POSES A SERIOUS THREAT TO LEGITIMATE MICHIGAN BUSINESSES.

In September 2001, the Match-e-be-nash-she-wish Band of Potawatomi Indians (also known as the "Gun Lake Band") chose a less-strenuous option than a legislative bill and sought approval of a single house resolution (HR 167)² that would permit them to build a Class III gaming (i.e. casino-style gambling) facility near Wayland, Michigan, roughly half way between Grand Rapids and Kalamazoo. The Chamber was among the most vocal advocates opposing the resolution, citing the detrimental impact that such a development would have on businesses throughout the region. To the relief of citizens and businesses throughout West Michigan, after much debate and lobbying by parties on both sides of the issue, the Michigan Legislature rejected the proposed resolution.

Thereafter, the State's general elections were held in November of 2002. Due to legislative term limits, retirements, and the normal political process, there was a significant turnover in Michigan government: 27 members of the Senate and 23 members of the House of Representatives were replaced and a new governor was elected. As a result, on January 1, 2003, a new legislature and new governor would be "running the show" in Michigan.

During the "lame duck" session between the November 2002 elections and the January 1, 2003 inauguration, the Gun Lake Band returned to the Legislature, seeking approval of

² Resolutions, which are much more informal and less demanding than submitting legislation through a bill, are usually reserved for ceremonial proclamations and congratulatory messages concerning athletic accomplishments (i.e., conference or national championships) or service recognition (i.e., to note a state officials' retirement or significant anniversary or years' of employment). Because the primary purpose of resolutions is to recognize and commend certain activities, a resolution simply needs a majority of those actually present when the vote occurs to pass. A legislative bill, however, involves open debate and committee review, followed by a majority vote of the *entire* House of Representatives and Senate. If a bill is not able to garner enough votes by the time the legislature calendar term is over, the bill dies.

essentially the same casino plan that was defeated just fourteen months before. After the resolution failed in September 2001, the casino proponents again chose the less-strenuous option: they introduced separate resolutions in the house and in the senate, since passing a single-chamber resolution requires a simple majority of those present at the time of the vote and does not require the language adopted in each chamber to be exactly the same.

On December 10, 2002, a majority of the Representatives present voted to approve a House Resolution that directed then-governor John Engler to set up a contract for a casino run by the Gun Lake Band. As reported in the *Detroit News*, “Three Mt. Pleasant businessmen who are investors in the casino - Sidney Smith, Barton LaBelle and James Fabiano - poured about \$160,000 into a political-action committee that funneled campaign contributions to lawmakers between 1998 and this year. ... Of the 53 lawmakers currently in the House who received donations from the PAC bankrolled by Smith, LaBelle and Fabiano, 45 voted “yes”; five voted “no”; and three didn’t vote Tuesday.”³

Likewise, two days later, a majority of those present in the Senate approved a Senate Resolution asking Governor Engler to approve the gambling Compact. *The Detroit Free Press*, in an article written December 13, 2002, described the resolution as “controversial,” and noted: “Backers of the casino said it will provide a boost to the economy in southwest Michigan. But it faced widespread opposition from residents and representatives of west Michigan for various reasons, including fears that it could undermine attempts to maintain a vibrant downtown district in Grand Rapids.”⁴

³ “*House Directs Engler to Negotiate new Casino*,” by Mark Hornbeck, *Detroit News*, December 11, 2002 attached as Tab A.

⁴ “*West Mich. Casino Permitted – Lawmakers Will Return Today to Wrap Up Session*,” by Dawson Bell and Kathleen Gray, *Detroit Free Press*, December 13, 2002, attached as Tab B.

Fortunately, with less than forty-eight (48) hours remaining in his term, Governor Engler announced that he would not sign the Compact, citing a conflict of interest. However, he sent a recommendation urging his successor to sign the Compact. As of the date of this writing, Governor Granholm has not announced whether she will do so.

Thus, Michigan residents are faced with a significant legal question: can a resolution of a Legislature that is no longer in session, passed to encourage a governor who is no longer in office to take action, survive a change in administration, when a bill passed by the same Legislature that is not signed by the governor before the end of that legislative session would die for lack of action? And, if Governor Granholm opts not to sign the Compact, can *her* successor, in reliance on the 2002 resolution, sign the Compact without any further legislative debate?

The GRACC is aware that the casinos involved in this Appeal do not include the Wayland casino. However, the Wayland casino was approved utilizing the same resolution process as the casinos at issue in this Appeal. The Wayland casino highlights the absurd lengths to which the resolution process can be abused. It also provides the Court with additional considerations to ponder when it decides whether the resolution process was used appropriately in the case pending before it.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 21, 1997, Michigan's Attorney General issued an opinion holding that Indian gambling compacts with the State were legislative in nature. Thus, to validly bind itself to a tribal-state gaming compact under the Indian Gaming Regulatory Act ("IGRA"),⁵ the State required the legislative approval of the compacts, and not a mere resolution. The Attorney General's Opinion cited well-settled Michigan law criticizing the use of resolutions:

⁵ OAG, 1997-1998, No. 6960 (October 21, 1997), attached as Tab C.

[I]t has long been established law in Michigan that a mere legislative resolution 'is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.' *Becker v Detroit Savings Bank*, 269 Mich 432, 434-435; 257 NW 853 (1934), *quoting* with approval from *Mullan v State*, 114 Cal 578; 46 P 670 (1896). *See also*, *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935), and *United Ins Co v Attorney General*, 300 Mich 200, 205-206; 1 NW2d 510 (1942). This point was recently reiterated by the Michigan Court of Appeals in *Blank v Dep't of Corrections*, 222 Mich App 385, 396-397; 564 NW2d 130 (1997) . . .⁶

On December 10 and 11, 1998, despite the Attorney General's Opinion, the Michigan Legislature - cognizant that it did not have the required votes to pass the measure through the normal legislative process - approved four Indian gambling compacts ("Gambling Compacts") in Michigan communities by a concurrent resolution ("HCR 115").⁷ The Gambling Compacts allowed, among other things, individuals as young as 18 years old to participate in Class III Gambling, which was a change in Michigan's law prohibiting gambling for individuals under the age of 21.⁸ The Gambling Compacts also enable the state to pick and choose between state laws that will be applied in the casino. The resolution passed by forty-eight (48) supporting votes in the Michigan House of Representatives - well below the fifty-five (55) votes required to pass legislation of general application or the seventy-two (72) votes needed if the legislation was of local application.

⁶ Although Opinions of the Attorney General are not binding, they can be persuasive authority. *-Indenbaum v Michigan Bd of Medicine*, 213 Mich App 263; 539 NW2d 574 (1995).

⁷ A "concurrent resolution" is a resolution expressing the sentiment or intent of both houses, on matters of interest of the Legislature.

⁸ Michigan Gaming Control and Revenue Act, MCL § 432.201 *et seq* makes it a misdemeanor for a person under the age of 21 to engage in casino-style gambling. While the Act excludes gambling on Indian territory, the Michigan legislature has previously made policy decisions regarding the age of a person who may lawfully engage in casino-style gambling through legislation. *See*, Ingham County Circuit Court Opinion and Order, dated January 18, 2000.

The Taxpayers of Michigan Against Casinos (“TOMAC”) sought a declaratory ruling in Ingham County Circuit Court that the Gambling Compacts violated Michigan’s Constitution because (1) they were legislation that needed to be approved via a bill in accordance with the Michigan Constitution, and were not appropriately the subject of the less-stringent resolution process; (2) the State failed to approve the Gambling Compacts in accordance with the Constitutional requirements for local acts, and (3) the Gambling Compacts’ terms violated the separation of powers between the executive and legislative branches.

On January 18, 2000, the Ingham County Circuit Court agreed with TOMAC on two of the three issues presented.⁹ The Court held that HCR 115 was legislation enacted through unconstitutional means, and that the Gambling Compacts’ terms diluted the separation of powers by allowing the governor *carte blanche* authority to amend the Compacts’ terms. After reviewing IGRA and Michigan law, the Court stated:

‘The Legislature is the final arbiter of this state’s public policy. The quintessential political judgment whether to alter the quality of our collective life in Michigan by legalizing casino gambling should occur in the political branch.’ *Michigan Gaming Institute, Inc v State Bd of Education*, 211 Mich App 514, 522; 536 NW2d 289 (1995) (Corrigan, J., dissenting) *rev’d* 451 Mich 899; 547 NW2d 882 (1996). Casino gambling is a highly regulated activity that has been considered a moral evil by the citizens of the State of Michigan for decades. While it is not this Court’s place to pass judgment on this public policy; this case involves just that - an issue of public policy. As such, it is for the people of this State, via their representatives in the Michigan Legislature, to determine the State’s policy regarding gambling. Therefore, when the Legislature changes its longstanding policy regarding casino-style gambling, it must do so through the enactment of legislation and all of the procedures pertaining thereto. (Citations omitted)

On November 12, 2002, the Michigan Court of Appeals reversed the Circuit Court’s ruling that the Gambling Compacts were unconstitutionally enacted. The Court of Appeals claimed that the Gambling Compacts were not legislation; that IGRA preempted Michigan law

⁹ The Circuit Court did not agree with TOMAC’s claim that the Gambling Compacts were improperly enacted “local acts” under Michigan’s Constitution.

regarding the State's ability to regulate gambling on tribal land¹⁰; and that compacts were not local acts. On December 3, 2002, TOMAC sought leave to appeal to this Court for a determination that the "passage" of HRC 115 was unconstitutional ("Appeal"). GRACC agrees with TOMAC'S Appeal files this Brief *Amicus Curiae* in support.

ARGUMENT

TOMAC's Appeal thoroughly addresses two of the four issues presented to this Court for consideration. Mindful of this Court's time, the Chamber will focus primarily on the specific issues to which it – as a representative of West Michigan businesses – is uniquely situated and qualified to offer its insight and information.

I. THE LEGISLATURE'S USE OF RESOLUTIONS TO APPROVE THE GAMING COMPACTS, CONTRARY TO MICHIGAN'S PUBLIC POLICY DISFAVORING GAMBLING, VIOLATED ARTICLE 4, §22 OF THE MICHIGAN CONSTITUTION, SINCE POLICY DECISIONS OF THAT NATURE MUST BE RESOLVED THROUGH THE INTRODUCTION AND PASSAGE OF BILLS.

It is clear that casino-style gambling is against Michigan's public policy.¹¹ With limited exceptions, Michigan law prohibits casino-style gambling and imposes criminal sanctions on

¹⁰ In this respect, the Court of Appeals' decision contradicts the United States Supreme Court decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which held that IGRA does **not** pre-empt a State's right to regulate Class III gambling, and forbid an aggrieved Indian tribe from suing a State in federal court seeking to impose the terms of a gaming compact.

¹¹ See, *State ex rel. Comm'r of State Police v Nine Money Fall Games*, 130 Mich App 414; 343 N.W.2d 576 (1983).

those who violate the law.¹² The narrowly circumscribed exceptions to Michigan's prohibition against casino-style gambling only emphasize the State's public policy disfavoring gambling.¹³

A. THE MICHIGAN CONSTITUTION REQUIRES THAT ALL LEGISLATION MUST BE BY BILL, ORIGINATED IN EITHER HOUSE, SUPPORTED BY A MAJORITY OF THE MEMBERS OF EACH HOUSE.

Article 4, Section 22 of the Michigan Constitution¹⁴ requires that "[a]ll legislation shall be by bill and may originate in either house." Article 4, Section 26¹⁵ requires that no bill shall become law without concurrence of a majority of the members of each house. Finally, Article 4, Section 33¹⁶ provides that "[e]very bill passed by the legislature shall be presented to the governor before it becomes law," and the governor must be afforded the opportunity to either approve or veto the bill. These safeguards are intended to assure that the process of making new laws or changing existing ones is done in a fair, equitable and predictable manner that assures the opportunity for public input and open debate.

¹² See, MCL § 432.201 *et seq* and MCL § 750.301 *et seq*; *Michigan Gaming Institute, Inc v State Bd of Educ*, 211 Mich App 514; 536 N.W.2d 289 (1995) (J. Corrigan dissent) *rev'd* 451 Mich 899; 547 NW2d 882 (1996).

¹³ Michigan allows for non-profit bingo, parimutuel betting, the State lottery, and three casinos in Detroit pursuant to Proposal E (which was passed through proper constitutional means) and resulting in the enactment of the Michigan Gaming Control Act, MCL § 432.201 *et seq*.

¹⁴ Const 1963, Art 4, § 22.

¹⁵ Const 1963, Art 4, § 26. ("No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house").

¹⁶ Const 1963, Art 4, § 33.

**B. MICHIGAN CASES AND ATTORNEY GENERALS' OPINIONS
ACKNOWLEDGE THAT RESOLUTIONS DO NOT HAVE THE
FORCE OR EFFECT OF LAW, AND ARE INEFFECTIVE TO
INITIATE LAW OR TO AMEND AN EXISTING LAW.**

As stated above, on October 21, 1997, Michigan's Attorney General issued an opinion holding that Indian gambling compacts with the State were legislative in nature.¹⁷ Of more significance to this particular argument, though, was the Attorney General's analysis of Michigan law emphasizing the difference between legislation and resolutions:

[I]t has long been established law in Michigan that a mere legislative resolution 'is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.' *Becker v Detroit Savings Bank*, 269 Mich 432, 434-435; 257 NW 853 (1934), *quoting* with approval from *Mullan v State*, 114 Cal 578; 46 P 670 (1896). *See also*, *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935), and *United Ins Co v Attorney General*, 300 Mich 200, 205-206; 1 NW2d 510 (1942). This point was recently reiterated by the Michigan Court of Appeals in *Blank v Dep't of Corrections*, 222 Mich App 385, 396-397; 564 NW2d 130 (1997) . . .

The 1997 Opinion was just the most recent in a long line of Attorney General Opinions that recognize the significant difference between what may be accomplished through legislation versus resolution.¹⁸ For instance, in 1967, the Attorney General opined that the Legislature acts effectively only by laws, and a concurrent resolution does not have the force and effect of law and is not a competent method of expressing legislative will where that expression is to have force of law and bind others than members adopting it.¹⁹ Citing *1 Cooley, Constitutional Limitations*, 8th ed., p. 266, the Attorney General noted: "* * * nothing becomes law simply and

¹⁷ OAG, 1997-1998, No. 6960 (October 21, 1997).

¹⁸ The Attorney General Opinions cited in this section are attached as Tab G to this Brief. Unfortunately, the Chamber was only able to obtain telefaxed duplicates of microfiche copies of these Opinions, so the copy quality is less than desired. The Chamber sincerely apologizes for any inconvenience this causes the Court and opposing counsel.

¹⁹ OAG 1967, No. 4586, p. 65. (July 13, 1967)

solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, **in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential.**"²⁰

A 1939 Attorney General Opinion ruled that a concurrent resolution seeking to "clarify" legislative intent relative to an earlier amendment to a particular statute had no effect as legislation, because it failed to comply with the constitutional requirements in place for the passage of legislation.²¹ Earlier the same year, when the Senate sought via resolution to authorize the state department of agriculture to sell part of the State Fair Grounds, the Attorney General held a Senate resolution is not a legislative enactment, and therefore such a procedure was impermissible in the absence of any other existing statutory authority to make such sale.²²

In August 1933, when the Legislature attempted via concurrent resolution to amend the state sales tax, the Attorney General issued an Opinion that "a bill may not be amended nor any legislation be instituted by a concurrent resolution."²³ This ruling was in keeping with an earlier decision the same year recognizing that a joint or concurrent resolution "cannot be construed to be authorized for the purpose of originating or amending legislation."²⁴

The June 21, 1933 Attorney General Opinion is significant in that it highlights the legislative history rejecting the former practice of permitting laws to be established via resolution:

²⁰ *Id.*, at p. 70 (emphasis added).

²¹ OAG 1939-40, p. 275. (October 17, 1939)

²² OAG 1939-40, p. 28. (February 1, 1939)

²³ OAG 1933-34, p. 321, 322. (August 31, 1933)

²⁴ OAG 1933-34, p. 275, 277. (June 21, 1933)

Attention is called to the fact that, under the Constitution of 1850, Article 4, Section 19,²⁵ it was provided that every bill **and joint resolution** shall be read three times, etc. **Under that provision of the Constitution, it was possible for the legislature to originate legislation by a bill or a joint resolution.**

* * *

The Constitution of 1908, it will be noted, left out the term “joint resolution” and provided specifically in Section 19²⁶ that all legislation shall be by bill.

* * *

Under the rule above quoted, a joint or concurrent resolution cannot be construed to be authorized for the purpose of originating or amending legislation.²⁷

Thus, the legislative history of the Constitutional provisions clearly evidences an intent to assure that legislation could not be enacted or amended through the resolution process, for that power was specifically removed by the drafters of the 1908 Constitution.²⁸

Although none of these Attorney General Opinions have the force of law, and although most were reviewing and interpreting earlier versions of Michigan’s Constitution, they evidence a recurring theme that still rings true in this case: while resolutions at one time were recognized as a manner in which to enact law, that process was eliminated in revisions to the Constitution in 1908. Therefore, resolutions are not and may not be used as a short-cut to avoid the legislative process set forth in Article 4 of Michigan’s Constitution of 1963.

²⁵ Const 1850, Art 4 § 19

²⁶ Section 19 is the predecessor to what is now Article 4, Section 22. Const. 1908, Art 4 Sec 19

²⁷ OAG 1933-34 at p. 277 (emphasis added).

²⁸ See also, OAG1930-32, p. 219 (May 20, 1931) (Attorney General noted that a concurrent resolution that did not comply with constitutional provisions governing procedure by which a bill becomes a law was not legislation and was effective “only as expressing the opinion of the legislature on a particular subject.”); OAG 1928-30, p. 321 (April 12, 1929) (Attorney General ruled ineffective the Legislature’s attempt to give retroactive effect to legislation by adopting a concurrent resolution).

C. THE DECISION IN *BLANK V DEPARTMENT OF CORRECTIONS* CLEARLY ESTABLISHES THAT THE DECISION TO ALLOW INDIAN TRIBES TO OPERATE CASINOS IN MICHIGAN WAS LEGISLATIVE AND NOT APPROPRIATELY THE SUBJECT OF A RESOLUTION.

GRACC agrees with and supports the analysis and conclusion of both TOMAC and the Ingham County Circuit Court. In Michigan, all legislation must be enacted by a bill originated in either house.²⁹ According to the decision in *Blank v Department of Corrections*,³⁰ which the Court of Appeals either failed to address or neglected to mention in its decision giving rise to this Appeal, “legislation” is any action that (1) “has the power to alter the rights, duties, and relations of parties outside the legislative branch;” (2) “involved policy determinations;” and (3) “supplants other legislative methods for reaching the same result.”³¹

The Gambling Compacts are clearly legislation that must be passed by a bill. They significantly impact and amend Michigan’s public policy against gambling and create new rules regarding gambling that will affect parties outside the legislative branch, including GRACC’s members. Based upon TOMAC’s and the Ingham Circuit Court’s analysis of applicable law, GRACC respectfully requests this Court to reverse the Court of Appeals’ decision and declare the passage of the Gambling Compacts by means of a resolution unconstitutional.

²⁹ Const 1963, Art 4, § 22.

³⁰ *Blank v Department of Corrections* 222 Mich App 385; 564 NW2d 130 (1997) *aff’d in part*, 462 Mich 103; 611 NW2d 530 (2000).

³¹ *Id.* at 112-20.

D. THE CASUAL AND UNREGULATED NATURE OF RESOLUTIONS ESTABLISH THAT THEY ARE ILL-SUITED FOR DETERMINING MATTERS THAT ARE LEGISLATIVE IN NATURE AND IMPACT PUBLIC POLICY.

Michigan's legislature is a sovereign and independent branch of government vested with the power to enact laws by which the actions of the government and the people of Michigan are regulated and protected.³² The direct link between Michigan citizens and their legislators is reflected in a declaration that must be at the beginning of every law: "The People of the State of Michigan enact."³³

The Michigan legislature convenes annually on the second Wednesday of each January of each year.³⁴ Each session continues until the legislators agree by a concurrent resolution to adjourn "*sine die*."³⁵ In odd numbered years, any bill, business or joint resolution that has not yet been voted on by the end of the legislative session is simply "carried over" to the next legislation process.³⁶ By contrast, in even numbered years, issues that are still pending when the legislative session ends are removed from the calendar and are not carried over to the next regular session.

Regardless of the year in which a bill is submitted, though, if a bill has been passed by both houses but remains unsigned by the governor, the bill is "pocket vetoed" and does not become law. Anyone wishing to re-introduce the bill must first amend it and then begin the entire legislative process again.

³² The Michigan Legislature Website, www.MichiganLegislature.org.

³³ MI Const Art 4, § 23.

³⁴ MI Const Art 4, § 13.

³⁵ *Id.* The term "*sine die*" means "without day" or "without assigning a day for a further meeting or hearing." *Black's Law Dictionary, Sixth Ed.* Thus, "a legislative body adjourns *sine die* when it adjourns without appointing a day on which to appear or assemble again." *Id.*

³⁶ MI Const Art 4, § 13.

1. The Legislative Process Includes Many Procedural Steps that a Bill Must Clear Before It Is Enacted Into Law.

Michigan's Constitution and the rules governing the House of Representatives and the Senate outline in explicit detail the numerous steps required before a bill becomes law. A bill may be introduced by either the House of Representatives or the Senate.³⁷ Under Michigan's Constitution, every bill must be read three times before it can be passed into law.³⁸ Upon introduction of the bill, it is also referred to a standing committee in both houses and is printed or reproduced and in the possession of each house for at least five (5) days.³⁹ The legislature considers a bill by discussing and debating it after holding public hearings regarding the bill. After committee review, open debate, and a third reading, the bill is either passed or defeated by a roll call vote of the majority of the members elected and serving.⁴⁰ If a bill passes, it is sent to the other house of the Legislature where the bill follows the same procedure outlined above, resulting in a defeat or passage.⁴¹

Every bill passed by both chambers of the legislature must be presented to the governor before it becomes law.⁴² The governor then has fourteen (14) days to consider the bill.⁴³ If the governor approves the bill, he or she must sign it and file it with the Secretary of State.

³⁷ MI Const Art 4, § 22.

³⁸ MI Const Art 4, § 26.

³⁹ *Id.*

⁴⁰ In certain circumstances, the bill can also be delayed for further consideration. The State of Michigan Website, www.Michigan.gov.

⁴¹ The State of Michigan Website, www.Michigan.gov.

⁴² MI Const Art 4, § 33.

⁴³ *Id.*

Thereafter, the bill becomes law, generally ninety days after the legislature ends its regular session *sine die*.⁴⁴ If the governor vetoes the bill while the legislature is still in session, he or she returns the bill within the 14-day timeframe to the chamber that originated the bill with his or her objections.⁴⁵ The chamber then enters the governor's objections in its journal, reconsiders the bill, and both houses have to vote once again on the bill.⁴⁶ If the governor neither signs nor vetoes the bill while the legislature is still in session, the bill will become law as if the governor signed it.⁴⁷ *If, however, the governor neither signs nor vetoes the bill but the legislature has adjourned its regular session sine die, the unsigned bill dies and does not become law.*⁴⁸ This is in keeping with the basic tenet in Michigan law that the acts of one legislature cannot tie the hands of future legislatures.⁴⁹

Thus, the rules governing the process of enacting bills into law provide safeguards against ill-advised or ill-considered proposals being enacted into law by a distracted or inflamed legislature that fails to subject a proposal to the contemplative study and debate set forth in Michigan's Constitution. They also protect the public from a lame duck legislature imposing its will on subsequent sessions by explicitly stating that unsigned bills do not survive an

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Ateas v Wayne County Bd of Auditors*, 281 Mich 596; 275 NW 507 (1937); *Cooper, Wells & Co v City of St. Joseph*, 232 Mich 255; 205 NW 86 (1925); *Detroit v Detroit & Howell Plank Road Co*, 43 Mich 140; 5 NW 275 (1880).

adjournment *sine die*. The treatment of resolutions under similar circumstances, however, is not quite as certain.

2. The Resolution Process Lacks the Procedural Safeguards Included in the Normal Legislative Process.

It has long been established that resolutions are not law.⁵⁰ Therefore, in stark contrast to the procedural safeguards restraining the legislative process, the rules governing the passage of resolutions are far less demanding. Because the resolution process is not intended to be used to make law, all that is required for the passing of a resolution is the approval of a majority of legislators who happen to be present at the session in which the resolution is being considered.⁵¹ Resolutions are not subject to the same roll calls or other constitutional protections set forth in the rules governing the passage of a bill.⁵²

⁵⁰ *Boyer-Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935); *Becker v Detroit Savings Bank*, 269 Mich 432, 257 NW 853 (1934) (“A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it. The fact that it may have been intended to subserve such purpose can make no difference. The requirements of the constitution are not met by that method of legislation. ‘Nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode appointed by the instrument which invests them with power, and under all the forms which that instrument has rendered essential.’ ...”)

⁵¹ See, House and Senate Rules.

⁵² MI Const Art 4, § 33.

A resolution is simply a document expressing the will of the House or the Senate.⁵³ Resolutions are used to urge state agencies or Congress to take certain actions; to formally approve certain plans of governmental agencies; to conduct certain legislative business; or to establish study committees to examine issues.⁵⁴ Most commonly, legislators offer resolutions as an expression of congratulations, commemoration or tribute to an individual or group.⁵⁵ For example, on April 3, 2003, a senator introduced a resolution calling for the Michigan Senate to fly the POW/MIA flag over the Capitol in recognition of those who have been prisoners of war or listed as missing in action while in service of our country.⁵⁶

Actions such as honoring POWs and/or MIAs are legitimate uses of the resolution process. Actions, however, that seek to alter the existing law in Michigan regarding gambling are not legitimate uses of the resolution process.

⁵³ There are three types of resolutions: (1) A single resolution is a resolution that is introduced in one chamber of the legislature and passed by a simple majority of the legislators present; (2) A concurrent resolution is a resolution expressing the sentiment or intent of both houses. In other words, both houses pass the exact same language in the resolution by a majority of the legislators present; (3) A joint resolution is a document used to propose an amendment to the Michigan Constitution, to ratify an amendment to the Constitution of the United States, or to handle certain matters where power is solely vested in the Legislatures of the states by the United States Constitution. Joint resolutions used to propose amendments to the Michigan Constitution require a two-thirds majority in each house elected to pass and are not considered by the Governor. Although the three resolutions identified above differ from one another, no resolution – even the joint resolution, which requires two-thirds majority in each house elected for passage – has the ability to change or alter Michigan law. The Michigan Legislature Website, www.MichiganLegislature.org.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See State senator Gilda Jacob's Press Release, dated April 3, 2003.

3. Resorting to the Resolution Process to Approve Substantive Policy Decisions, Thereby Avoiding the More Stringent Requirements for Legislative Acts, Deprives the Public of the Constitutional Safeguards Against Ill-Advised Acts.

By approving the Gaming Compacts through resolution rather than legislation, the Michigan legislature unjustifiably disregarded the constitutional safeguards set forth above. The casino proponents took full advantage of the lame duck session to obtain passage of a fundamental change to well-established public policy – and did so in a manner that required far fewer votes than are required to change the law through the appropriate legislative process.

Most alarmingly, the use of the resolution process in this instance accomplished another very significant purpose: it deprived opponents of the plan the opportunity to insist that the policy shift be subjected to the contemplative study and debate assured by the procedural safeguards to which bills are normally subjected. Without the opportunity to voice their concerns to a lame duck legislature facing literally hundreds of pieces of proposed legislation in the waning hours of its term, the public lost the opportunity it would normally have to assure that its representatives have thoroughly studied the ramifications of their acts and were made aware of the will of the citizens whom they were elected to represent.

One need look no further than the Legislature's handling of the Wayland casino resolutions to see the actual and significant threat to the constitutional protections realized as a result of the failure to rely on the normal legislative process. In that instance, the casino proponents sought and obtained approval of "single house resolutions" rather than through concurrent resolutions. The House passed its Resolution on December 10, 2002; the Senate passed its similar Resolution just two days later, on December 12, 2002. Had the Wayland casino been subjected to the normal legislative process, the proposals would have had to have been in

the possession of each house for at least five (5) days,⁵⁷ and therefore the Senate could not have even considered the proposal until at least December 15, 2002. Concerned citizens and groups like the GRACC could have used the “extra” three days *required by the Michigan Constitution* to educate their legislators and convince them as to the negative impact of the proposed casino. Because the casino backers improperly utilized the resolution process, this constitutionally guaranteed opportunity for public input was lost.

As discussed in greater detail below, the legislature has never adopted any standard, rule, or procedure for assessing the impact of Class III Indian gaming facilities in Michigan. Likewise, until GRACC commissioned the Anderson Economic Group Study discussed below, no one had done any objective analysis of the economic impact of casinos. In the absence of any such rules, policies, procedures or analysis, the constitutional safeguards governing the legislative process are even more vital to protect Michigan’s citizens and businesses – and the threat posed by ill-considered and less-regulated resolutions even more dire.

II. MICHIGAN’S RIGHT TO REGULATE GAMBLING ON INDIAN LANDS THROUGH COMPACTS IS NOT PRE-EMPTED BY IGRA, AND IS VITAL TO PROTECTING MICHIGAN’S CITIZENS AND BUSINESSES.

The Court of Appeals ruled that the federal Indian Gaming Regulatory Act (“IGRA”)⁵⁸ preempted Michigan’s right to regulate Indian casinos. This conclusion is simply wrong, for at least three reasons.

⁵⁷ MI Const Art 4, § 26.

⁵⁸ 18 USC §§ 1166-68, 25 USC 2701-2721.

A. MICHIGAN'S ABILITY TO REGULATE INTRA-STATE COMMERCE IS GUARANTEED BY THE UNITED STATES CONSTITUTION.

First, individual states are guaranteed the ability to regulate intra-state commerce under Article I of the United States Constitution.⁵⁹ States retain the power to adopt legislation reflective of their local values and consistent with their own public policy, except where specifically prohibited. This is just and proper, since it is the people of Michigan, through their elected representatives and in accordance with the rules applicable to the passage of legislation within the State, who will feel the economic and social impact of the proposed casinos.

B. IGRA EXPLICITLY RECOGNIZES THE STATE'S RIGHT TO REGULATE GAMING ACTIVITY WHERE, AS HERE, THE STATE LAW AND PUBLIC POLICY PROHIBITS GAMBLING.⁶⁰

Second, nothing in IGRA prohibits states from regulating Indian gaming. To the contrary, IGRA and relevant case law support a state's right to place limits on or completely forbid casino gambling, even when sponsored by an Indian tribe.⁶¹

On April 22, 2003, the United States District Court for the Western District of Wisconsin became the latest in a string of courts to recognize that IGRA does *not* pre-empt a State's right to regulate gambling within its borders – even if that gambling is on tribal land.⁶² *Lac Courte*, a

⁵⁹ US Const, Art I, § 8, cl 3; *Missouri Pac r co v Lavabee Flour Mills Co*, 29 SCt 214 (1909).

⁶⁰ Because TOMAC wrote a comprehensive analysis of *California v Cabazan Band of Mission Indians*, 480 US 202; 107 SCt 1083; 94 LEd2d 244 (1987) and IGRA, this section is intended to supplement TOMAC's position and thus, GRACC will not recite the same arguments or legal authority except to say that GRACC agrees with and incorporates TOMAC's position and legal analysis in this brief.

⁶¹ See, 25 U.S.C. § 2701(5) and case law cited in TOMAC's Appeal.

⁶² *Lac Courte Oreilles Band of Lake Superior Chippewa Indians et. al. v U.S.*, (W.D.Wisc., Case No. 02-C-0553-C, April 22, 2003).

copy of which is attached as Tab D, contains a clear and concise explanation of the legislative history that prompted IGRA which GRACC urges this Court to consider. That legislative history, combined with IGRA's express terms, convinced the *Lac Court* court that Congress' delegation of power to governors to determine whether Indian gaming facilities should be permitted in their states was proper and constitutional and that IGRA did not pre-empt the governors' right to regulate casino gambling in their states.

Likewise, the Sixth Circuit – in a case arising in Michigan – found that Congress enacted IGRA to give states a role in regulating Indian gaming.⁶³ In fact, IGRA itself unambiguously grants to states regulatory authority over gambling.⁶⁴ The law and public policy of the state establish the scope of permissible gaming on tribal lands.⁶⁵

In *Coeur d'Alene Tribe v State* – like the present case – a state's right to regulate casino-style gambling under IGRA ("Class III Gambling") was at issue. Except for a few limited exceptions, gambling was strictly prohibited and against public policy in Idaho. The exceptions included the state operating a lottery, licensing and regulating horse, mule, and dog races, bingo and raffles. Despite the state law and public policy prohibiting gambling, the Indian tribe asked the state to negotiate a tribal-state compact governing Class III Gambling on the tribe's

⁶³ *Keweenaw Bay Indian Community v United States*, 136 F3d 469, 472 (6th Cir 1998); see also, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians et. al. v U.S.*, (W.D.Wisc., Case No. 02-C-0553-C, April 22, 2003 ("Congress enacted the gaming act in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that ... states such as California had no authority to apply their gambling laws to Indian gaming."))

⁶⁴ "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law *and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.*" 25 USC § 2701(5).

⁶⁵ *Coeur d'Alene Tribe v State*, 842 FSupp 1268 (D Idaho 1994), *aff'd* 510 F3d 876 (9th Cir 1995).

reservation. After this request, the state legislature amended its constitution to make clear that only a lottery, pari-mutuel betting, bingo, and raffle games were permitted and all other forms of gambling were expressly prohibited. Thereafter, suit was filed because – as the tribe contended – the State violated IGRA by refusing to negotiate Class III Gambling.⁶⁶ Specifically, the tribe argued that IGRA did not allow a state to restrict Indian gaming by modifying its laws and because the state allowed some Class III Gambling in other instances, the state had to negotiate all Class III Gambling with the tribe.⁶⁷ The State argued that because, except for a few specific instances, state law prohibited gambling, it was only required to negotiate Class III Gambling permitted under state law, which included a lottery, pari-mutuel betting, bingo and raffles.⁶⁸

The Court held that the State had the right to regulate Class III Gambling on tribal lands according to its state law because under IGRA, the law and public policy of a particular state set the scope of permissible Class III Gambling on tribal lands. In addition, a state's public policy permitting certain Class III Gambling in certain instances was not equivalent to permitting *all* Class III Gambling activities.⁶⁹

The Court reasoned that when Congress enacted IGRA, it made, among others, the following findings and provisions:

Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law *and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.* 25 U.S.C.S. § 2701(5).

* * *

⁶⁶ *Id.* at 1270.

⁶⁷ *Id.* at 1275.

⁶⁸ *Id.* at 1270.

⁶⁹ *Id.* at 1279.

Class III gaming activities shall be lawful on Indian lands *only* if such activities are...authorized by [tribal] ordinance or resolution...located in a State that permits such gaming for any purpose by any person, organization, or entity, and...conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.... 25 U.S.C.C. § 2710(d)(1).

The court then analyzed the phrase “Class III gaming activities shall be lawful ... only ... in a State that permits such gaming for any purpose by any person, organization, or entity ...” In analyzing the phrase, the court looked to the legislative history regarding the phrase in the Class II gambling provision of the statute:

The phrase ‘for any purpose by any person, organization or entity’ makes no distinction between State laws that allow Class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming ... (S. Rep. No. 446, 100th Cong., 2d Sess.) ...

* * *

Although the Senate Report addresses the phrase found in 25 U.S.C. § 2710(b)(1)(A), the identical phrase is used in Section 2710(d)(1)(B), and therefore also applies to Class III gaming. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030 (2d Cir. 1990). ‘It is a settled principle of statutory construction that ‘[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.’⁷⁰

The Court also reasoned that the state law - including its amendment - was applied to everyone, equally.⁷¹ Finally, the Court reasoned that IGRA did not prohibit a state from changing its gaming laws or amending its constitution prior to entering into a compact, and that there was

⁷⁰ *Id.* (citations omitted).

⁷¹ *Id.* at 1276.

nothing in IGRA that would prevent a state from abolishing and criminally prohibiting all Class III Gambling entirely.⁷²

The *Coeur d'Alene Tribe* analysis applies in this case: Idaho's laws and public policies are virtually identical to Michigan's regarding gambling. In Michigan, except for limited exceptions, gambling is illegal and against public policy.⁷³ More specifically, with the exception of those casinos authorized under separate gambling compacts and under Proposal E in 1996, casino gambling is illegal in Michigan.⁷⁴ The Michigan Supreme Court recently reviewed the long-standing rule and confirmed that gambling in Michigan was illegal and against public policy.⁷⁵

The Gambling Compacts at issue in this case are more egregious than *Coeur d'Alene Tribe* because, as proposed, they may alter existing Michigan law without going through the full legislative process. For example, it is clear that the State of Michigan does not allow casino-style gambling for persons under the age of 21.⁷⁶ The Gambling Compacts, however, clearly violate that prohibition by allowing persons 18 years old to gamble. Likewise, Michigan prohibits persons under the age of 21 to be eligible for an occupational license if the person performs any

⁷² *Id.* at 1276.

⁷³ The exceptions are stated in footnote 13, *supra*.

⁷⁴ See MCLA § 750.301 *et seq.* In this case, if the Gambling Compacts are upheld, the laws of Michigan would not be applied to everyone equally. Although Michigan has three casinos in Detroit, those gambling compacts were passed through thorough and proper constitutional means via a bill and not through a simple and quick resolution process.

⁷⁵ See *Michigan Gaming Institute, Inc v State Board of Education*, 451 Mich 899; 547 NW2d 882 (1996).

⁷⁶ MCL § 432.209(9).

function involved in gaming;⁷⁷ the Gambling Compacts change the age to any person under the age of eighteen (18). Finally, the Gambling Compacts alter Michigan law regarding who can be employed in a managerial position with a casino if the person has been convicted of a crime.⁷⁸ If the legislature wanted to change these laws, they have to go through full legislative process and gain a sufficient number of votes.

In accordance with the reasoning in *Coeur d'Alene Tribe, supra*, under IGRA, Michigan has the right to regulate and/or prohibit Class III Gambling and to decide where and when to allow such activity. As a result, the State is bound to and should proceed through the proper Constitutional channels to enact the Gambling Compacts to be consistent with Michigan law.

C. THE MICHIGAN LEGISLATURE HAS NOT ADOPTED ANY STANDARDS, RULES, POLICIES OR PROCEDURES FOR DETERMINING WHETHER ANY PROPOSED CASINO IS IN THE PUBLIC'S INTEREST.

In accordance with the powers granted to it by the United States Constitution, by IGRA, and by relevant case law, Michigan has the right to regulate Class III gaming within the State. Specifically, Michigan has the right through the compact process to regulate Class III gaming within the state and, in the absence of a compact, to prohibit it all together.⁷⁹ As the legislative branch of our State's government, the House and Senate have the responsibility to exercise this power through proper legislation – not by entering into side deals and through resolutions that provide no accountability to the public.

⁷⁷ MCL § 432.208(3).

⁷⁸ Compare MCL § 432.209(14) with Gambling Compacts, § 4(D).

⁷⁹ 18 USC § 1166.

Every tribal gaming compact negotiated by the state until now has been approved without any in-depth analysis of the costs and benefits of the community and region in which the casino is to be placed. Indeed, the legislature has neither required nor commissioned any studies of the economic impact of any proposed casino, and has adopted no rules, policies, procedures or standards for determining when casinos are and are not appropriate.

1. Under the Gambling Compacts, Indian Gaming Facilities Do Not Compete On An Equal Basis With Regional Businesses.

As stated previously, GRACC is committed to a free market system in which all competitors are allowed to compete on an equal footing. Indian gambling, however, is not fair competition; it is a monopoly. Legitimate businesses are not allowed to compete with casinos because casino gaming is a felony in Michigan. The primary purpose of the Gambling Compacts was to authorize Indian tribes to conduct casino-style gambling, which would be a clear violation of Michigan law absent the Compacts.

At the same time, the casinos will enjoy an unfair advantage of being an unregulated, and untaxed operation that is not subject to the jurisdiction of state or local government⁸⁰. Under the Gambling Compacts, the Indian gaming facilities receive perks that are unavailable to other area business. For instance, the Indian gaming facilities will not have to pay taxes or be subject to OSHA/MIOSHA. In the competitive marketplace that is the hallmark of the American dream, this singular treatment gives the Indian gaming, entertainment, and dining facilities an undeniably significant advantage over their non-Indian competitors. Because of the

⁸⁰ Indeed, the Chamber has been informed and believes that the State currently receives only roughly 20% of the revenues to which it is entitled under existing gaming compacts, because several of the tribes have refused to pay in protest against the voter-approved, non-Indian casinos in Detroit. Thus, the casinos are operating as a state authorized, non-taxable monopoly without providing any direct financial benefit to the State.

anti-competitive nature of the Indian tribe's autonomous power base, however, the Legislature needs to be even *more* demanding in order to assure a level playing field exists.

2. The Only Thorough and Objective Study of the Impact of Indian Gaming Casinos Establishes That the Presence of a Single Casino in West Michigan will Cause Immediate and Irreparable Damage to Legitimate Businesses Throughout the Region and Across the State.

GRACC does not take the position that the state can or should reject every proposal to locate a casino anywhere in Michigan. However, GRACC is aware of at least nine more groups that are currently seeking to be recognized as sovereign tribes within Michigan. Presumably, these actions are being undertaken so that these new "tribes" can obtain their own casinos.

(a) GRACC Commissioned an Objective Study by the Anderson Economic Group of the Impact of the Proposed Wayland Casino.

Aware that no one had ever conducted any sort of in-depth analysis of the impact of Indian casinos on the surrounding area, GRACC and a group of its members known as Community Partnership for Economic Growth ("CPEG") retained the Anderson Economic Group ("AEG") to perform an in depth and comprehensive analysis of the economic impact the Gambling Compacts would have on West Michigan's economy. In particular, GRACC chose AEG to ensure the study results would be accurate, reliable and *unbiased*.

AEG specializes in providing consulting services in economics, finance, public policy, and geographic market assessments. AEG's approach to work in these fields is based on its core principles of professionalism, integrity, and expertise. AEG is among the most highly respected economic consultants in Michigan and insists on a high level of integrity in its analysis, together with technical expertise in the field. AEG is dedicated to providing accurate and sourced analysis that reflects both the benefits and costs of any proposed activity. For these reasons, work by

AEG is commonly used in legislative hearings, legal proceedings, and executive strategy discussions. In fact, AEG has performed work for the state of Michigan, the state of Wisconsin, the city of Detroit, General Motors, the Detroit Lions, the Michigan Chamber of Commerce, and many other governments and companies.

Most importantly, the analysis of AEG speaks for itself. The AEG study (“Study”), attached as Tab E, is transparent and its methodology and assumptions are disclosed and thoroughly explained. The Study provides a realistic look at the economic impacts the Gambling Compacts will have on West Michigan, including GRACC’s members. *It is the most rigorous economic analysis of a casino ever performed in the state of Michigan.*

While AEG’s study focused on the proposed Gun Lake casino, GRACC submits that its methodology and analysis reflect the type of study that needs to be done for every proposed Indian Gaming facility in Michigan. Further, the Chamber believes that AEG’s conclusions regarding the overall negative impact on businesses and communities everywhere except the area immediately surrounding the casino is applicable to casinos through the State. In fact, the AEG Study seems to indicate that even those benefits will be dramatically reduced if more and more casinos are allowed to open in Michigan, thereby diluting the casinos’ target audience.

3. AEG’s Study Shows that Adding a Single Casino Will Have a Devastating Impact on West Michigan Businesses, and Cost More than 3,000 Michigan Jobs.

Because AEG has effectively explained the methodology used in its Study, the following analysis focuses solely on AEG’s findings regarding the economic impact of the addition of one casino on West Michigan businesses and communities.⁸¹ The Study explains numerous separate

⁸¹ See Tab E. It is important to remember when reading AEG’s findings that they are much more conservative and realistic than many reported analyses that fail to subtract costs, ignore “substitution effects,” or exaggerate benefits.

findings regarding – among other things – the casino’s: (1) economic and fiscal impact; and (2) employment impact.

(a) Adding a Single Casino Will Have a Devastating Impact on Businesses in West Michigan.

The Study clearly shows that West Michigan and the State will suffer an economic loss from the casino.⁸² While the casino will attract money to the county in which it is based, this isolated benefit will be overshadowed by the economic losses from *every* surrounding county and the state of Michigan.⁸³ Specifically, West Michigan counties surrounding the proposed casino will lose collectively \$131 million annually, and it will cost the State of Michigan more than \$300 million dollars in economic activity over the next ten years to support just one casino.⁸⁴ West Michigan businesses outside the immediate development area (i.e. Kalamazoo, Ottawa, and Kent Counties and the Lakeshore) will experience a drastic net economic loss due to the casino.⁸⁵

As the chart below clearly depicts, the net benefits experienced by the proposed casino’s host county will cost the rest of the State of Michigan \$123.5 million in 2004, and roughly \$1.5 billion between 2004 and 2014.⁸⁶ For instance, businesses in Kent County would experience the *largest economic loss* from the casino, since much of the money spent at the tax exempt and minimally regulated casino would otherwise be spent in legitimate, tax generating venues within

⁻⁸² The Study’s economic and fiscal impact assessment is located on pages 20 through 37 of Tab E.

⁸³ Tab E, pgs. 26-29.

⁸⁴ *Id.* at pg. 27.

⁸⁵ *Id.* at pg. 28.

⁸⁶ *Id.* at pgs. 27-28.

Kent County.⁸⁷ As a result, many of the region's businesses, which constitute eighty percent (80%) of GRACC's membership, will see their already tight profit margins dwindle as funds are diverted to Class III Gambling facilities that neither pay taxes nor follow the same type of regulations that inevitably raises the cost of doing business in Michigan.

According to AEG, Kent County would experience a net economic loss of \$49.7 million in 2004 and \$605.2 million between 2004 and 2014.⁸⁸ The net overall economic loss to Michigan would be \$26.1 million in 2004 and \$317.6 million between 2004 and 2014.⁸⁹ This loss represents a net transfer in economic activity outside of the state due to out-of-state payments to investors and management companies and other expenditures that greatly exceed the expected revenue from out-of-state visits to a casino.⁹⁰

⁸⁷ *Id.* at pg. 26.

⁸⁸ *Id.* at pgs. 27-28.

⁸⁹ *Id.* at pg. 26.

⁹⁰ *Id.* at pg. 27.

**TABLE 2. Summary of Net Economic Benefit, (\$Millions)
Allegan County compared to rest of Michigan**

Region	2004	2004 to 2014
Allegan County	97.5	1,185.9
Michigan (except Allegan)	(123.5)	(1,503.5)
Michigan Net Benefit (loss)	(26.10)	(317.57)

TABLE 3. Summary of Net Economic Benefit, by Region (\$Millions)

Region	2004	2004 to 2014
Allegan County	97.5	1,185.9
Barry County	(6.0)	(73.6)
Kalamazoo County	(4.4)	(53.7)
Kent County	(49.7)	(605.2)
Ottawa County	(12.3)	(149.2)
Northern Michigan	(15.3)	(185.9)
Middle Michigan	(24.1)	(293.2)
Southeast Michigan	8.1	98.7
Other Southwest Michigan ^a Counties ^a	(19.8)	(241.4)
Michigan Net Benefit (loss)	(26.10)	(317.57)

a. Berrien, Branch, Calhoun, Cass, St. Joseph, and Van Buren Counties.

The main reason West Michigan and the entire state will lose over \$300 million over the next decade is because the primary market for the casino is entirely within West Michigan. Therefore, a significant majority of revenue to the casino merely displaces household income that would have been spent or invested elsewhere in West Michigan. When this is combined with the fact that a majority of the casino revenue will be provided to its investors – who are the primary beneficiaries of the casino – the negative economic impact to West Michigan and the entire state amounts to over \$300 million.⁹¹

AEG's Study also clearly demonstrates that the casino will not attract out-of-state tourists. Interestingly, the casino investors acknowledged this in their submission to the Federal

⁹¹ *Id.* at pgs. 26-29.

Bureau of Indian Affairs (“BIA”). That submission shows that the primary market for the casino is West Michigan. Thus, the casino will not attract significant new revenue to the state.

(b) Adding a Single Casino Will Cost Michigan More Than 3,000 Jobs.

In addition to measuring the economic impact surrounding a single proposed casino, the Study also determined the effect that the casino would have on Michigan jobs.⁹² Based on sound econometric models, the Study shows that the casino will cost the State over 3000 jobs in the next decade, destroying two jobs for every one it creates.⁹³ While temporary jobs created through the construction of the casino will reduce the initial negative impact of the affect on employment, in the first year, the Casino will result in a net decrease of 1,738 Michigan jobs, compared to a net decrease of 2,594 to 3,100 jobs per year in the ten years following construction.⁹⁴ Below is a chart that depicts the economic impact to Michigan jobs:

⁹² The Study regarding the impact of Michigan jobs is found on pages 29 through 30 and page 38, Tab E.

⁹³ Tab E, pg. 30.

⁹⁴ *Id.* at pgs. 29-30.

TABLE 3. Economic Impact to Michigan Jobs^a

Year	Total Jobs Gained ^b	Total Jobs Lost	Net Change in MI Employment
2004	3,173	4,912	(1,738)
2005	2,416	5,010	(2,594)
2006	2,464	5,110	(2,646)
2007	2,512	5,212	(2,699)
2008	2,564	5,316	(2,753)
2009	2,615	5,423	(2,808)
2010	2,667	5,531	(2,864)
2011	2,721	5,642	(2,921)
2012	2,775	5,755	(2,980)
2013	2,830	5,870	(3,039)
2014	2,887	5,987	(3,100)

a. These figures represent a difference in annual jobs. For example, if the casino were opened, we expect there to be 2,864 fewer jobs in the economy by 2010.

b. Total Jobs Gained and Lost include direct, indirect, and tourism induced jobs. Total Jobs Gained in 2004 includes 805 construction jobs, although construction will likely be spread out over multiple years.

While the casino will result in the creation of between 46 and 56 tourism-related jobs, this results in a minor overall effect on the economy.⁹⁵ The impact of such an enormous job loss in West Michigan cannot be overstated.

Attached as Tab F is the National Gambling Impact Study Commission (“NGIS Commission”), which in June of 1999, recommended a “pause” in any further casino gambling expansion. The pause was intended to encourage government officials “to survey the results of their decisions and to determine if they have chosen wisely.”⁹⁶ Had the Michigan legislature “paused” and performed a study regarding the economic effects of placing a casino in West Michigan, it would have discovered that such a casino only brings massive economic and job loss to West Michigan. Because of who the GRACC represents, it believes that those who must

⁹⁵ *Id.* at pg. 30.

⁹⁶ NGIS Commission Report Overview, pg. 1-1 and 1-7.

deal with the casinos – i.e. West Michigan residents and businesses – are the best equipped, through their legislature, to prohibit and/or regulate Class III gambling. Due to the harsh impact on the free market, it is essential, on a public policy basis, that Michigan joins those other states that have interpreted IGRA to increase a state’s ability to regulate Indian casinos.

III. IT IS A VIOLATION OF THE MICHIGAN CONSTITUTION’S SEPARATION OF POWERS FOR THE MICHIGAN LEGISLATURE TO GIVE THE GOVERNOR OF MICHIGAN CARTE BLANCHE AUTHORITY TO AMEND GAMBLING COMPACTS WITH INDIAN TRIBES WITHOUT APPROVAL FROM THE LEGISLATURE.

GRACC agrees with and supports the analysis and conclusion of both TOMAC and the Ingham County Circuit Court. The most basic concept of constitutional law is the separation of powers between the different branches of government. At Michigan’s constitutional core, the government consists of a “checks and balances” system. According to the Michigan Constitution, the legislative branch (i.e. State House and Senate) has the power to enact laws and the executive branch has the responsibility to “take care that the laws be faithfully executed.”⁹⁷ Any sharing of power between the branches of government must be “limited and restricted.”⁹⁸ The Gambling Compacts ignore this principle. The Gambling Compacts grant the Governor of Michigan broad authority to amend the Gambling Compacts – and such amendments can be contrary to Michigan law – without seeking the legislature’s approval. Such broad powers are simply unconstitutional and the Court of Appeals’ decision allowing such an act to occur by ruling that the issue was not yet ripe because the Compacts have yet to be amended is wrong and should be reversed by this Court. Indeed, based on Governor Granholm’s recent amendment to the existing tribal-state gaming compact, this issue is riper than ever, and the Chamber supports the position taken by

⁹⁷ Const 1963, Art 4, § 1; Const 1963 Art 5, § 8.

⁹⁸ *Judicial Attorneys Ass’n v Michigan*, 459 Mich 291, 296-97; 586 NW2d 894 (1998).

TOMAC and the amicus brief filed by Senators Sikkema and Johnson that such *carte blanche* authority violates the Constitutional separation of powers.

Further, the legislature's attempt to change Michigan's laws regarding gambling without subjecting them to the normal legislative process, in favor of Gambling Compacts, the terms of which are negotiated by one person and not subjected to the legislative debate that is the hallmark of representative government, defies the separation of powers and deprives taxpayers of their right to voice their legitimate concerns regarding proposed legislation.

IV. A LEGISLATIVE ACT OF LOCAL APPLICATION THAT PURPORTS TO AUTHORIZE CASINO GAMBLING IN FOUR PARTICULAR MICHIGAN COMMUNITIES MUST COMPLY WITH ARTICLE IV, SECTION 29, OF MICHIGAN'S CONSTITUTION, WHICH SPECIFIES THE PROCEDURE FOR PASSING "LOCAL ACTS."

GRACC agrees with and supports the analysis and conclusion of TOMAC regarding its position that the Gambling Compacts are a legislative act of local application, which must be approved by the legislature by two-thirds of the elected members and passed by the citizens of the affected communities. When the Michigan legislature passed the Gambling Compacts, it violated the "Local Acts" provision of the Michigan Constitution.⁹⁹ The Gambling Compacts are clearly limited to specific local communities within the State. The Gambling Compacts, however, have never been approved by two-thirds of the elected members of the legislature nor passed by the citizens of the areas that the proposed casino would be located.

The added protection of requiring approval of the citizens of an affected community avoids favoritism and/or forcing communities to accept less than desirable projects. By not allowing citizens to vote, the Court of Appeals is allowing the legislature to do the very acts that the "citizen approval" requirement was added to avoid. Local businesses and residents have a

⁹⁹ Const 1963, Art 4, § 29.

right to approve or reject casinos in their communities and have the right to object to a minority of elected officials not from their local communities trying to force them to accept through the resolution process that which could not be accomplished legitimately through legislation.

Particularly where, as here, the Gambling Compacts involve a deviation from the normal legislative process to allow a practice that is recognized to be against public policy (i.e., casino gambling); which poses a threat to personal health and welfare (as evidenced by the statistics set forth above regarding the highly addictive nature of casino gambling); and which threatens the economic viability of legitimate, tax-paying Michigan businesses to permit the expansion of a preferred monopolistic enterprise with whom they do not compete on an equal footing; the need to require more stringent practices is clear. The super-majority requirement for local acts was designed to prevent abuses of power just like this.

As such, GRACC joins TOMAC in requesting that this Court acknowledge that the Joint Resolutions authorizing the Indian Gambling Compacts were “local acts” and therefore subject to the super-majority rules set forth in Michigan’s Constitution.¹⁰⁰ Having failed to obtain that requisite vote total, the Gambling Compacts are neither legitimate nor enforceable, and must be struck down. Therefore, for all the reasons outlined in TOMAC’s Appeal, GRACC respectfully requests this Court to reverse the Court of Appeals’ decision.

CONCLUSION

Utilizing the resolution process to accomplish what cannot be done via legislation is more than improper: it is unconstitutional. By using an informal, normally trivial procedure to accomplish significant changes in the laws of this State, the legislation not only violated established public policy by approving casino gambling that would otherwise be illegal, but also

¹⁰⁰ Const 1963, A-art 4, § 29.

avoided all of the procedural safeguards intended to protect the public against ill-advised acts. The resolution process, which provides for neither contemplative analysis of policy changes nor allows for open debate and public comment, is singularly inappropriate for enacting the sweeping changes embodied in the Gambling Compacts.

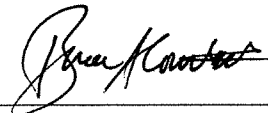
For these reasons, and for the reasons set forth above, the Grand Rapids Area Chamber of Commerce urges this Court to: overturn the Court of Appeal's decision; strike the resolutions approving Michigan Indian Gaming Compacts as unconstitutional violation of Article 4, Section 22 of the Michigan Constitution; and rule that IGRA does not pre-empt the State's ability to regulate casino gambling on all property in Michigan, including land owned by Indian tribes.

Dated: November 19, 2003

Respectfully submitted,

RHOADES McKEE
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TAB A

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Wednesday, December 11, 2002

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Wednesday, December 11, 2002

House directs Engler to negotiate new casino

By Mark Hornbeck / Detroit News Lansing Bureau

LANSING -- A proposed Indian casino near Grand Rapids cleared a major hurdle Tuesday when the House voted to direct Gov. John Engler to negotiate a gaming compact with the Gun Lake tribe of Pottawatomi Indians.

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The House voted 58-47 to urge Engler to work out a deal with the tribe, which wants to build a 190,000-square-foot gambling hall near Wayland, about 20 miles south of Grand Rapids. House members rejected more than 40 amendments and then passed the resolution without debate.

Marcia Halloran, a member of the Friends of the Gun Lake Band organization, said a casino will help boost the economy in western Michigan.

"This has been a long time coming," she said after the House vote. "We're just very pleased about how it went."

The measure still needs Senate approval. It passed the House over protests from dozens of people who live near the casino site. They held up signs that said "CasiNo" as lawmakers walked into the Capitol.

"I feel the casino would bring in more crime, more traffic, more drinking and driving, and more degradation of the neighborhood," said Bobbie Holmes, a mother of three from Wayland.

Three Mt. Pleasant businessmen who are investors in the casino -- Sidney Smith, Barton LaBelle and James Fabiano -- poured about \$160,000 into a political-action committee that funneled campaign contributions to lawmakers between 1998 and this year.

Of the 53 lawmakers currently in the House who received donations from the PAC bankrolled by Smith, LaBelle and Fabiano, 45 voted "yes"; five voted "no"; and three didn't vote Tuesday.

Engler initially said he wouldn't negotiate a compact with the tribe, but later said he'd do so if directed by the Legislature.

Detroit News Bureau Chief Charlie Cain contributed to this report. You can reach Mark Hornbeck at (517) 371-3660 or mhornbeck@detnews.com.

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TAB B



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West Mich. casino permitted

Lawmakers will return today to wrap up session

December 13, 2002

BY DAWSON BELL AND KATHLEEN GRAY

FREE PRESS STAFF WRITERS

LANSING -- Michigan's lame-duck Legislature will assemble today for a final push to expand charter schools in the state, create a mass transit authority in metro Detroit and authorize more hospital beds in Oakland County.

The House and Senate left Thursday after approving a flurry of other bills, including the elimination of mandatory minimum or consecutive prison sentences for some drug offenses. The package of bills would give judges more discretion in meting out punishment for drug crimes, distinguishing between major drug dealers and users.

House Speaker Rick Johnson, R-Leroy, said he will attempt one final time today to lift a cap on the number of charter schools allowed. A proposal by a special commission earlier this year to gradually increase charter schools is unlikely to pass, but Johnson and others hope to patch together a compromise bill that would address what proponents say is a pent-up demand for more charter schools.

Gov. John Engler has tried for several years to lift the charter schools cap but has been frustrated by the Legislature.

Today also may result in a final showdown over

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■ [Bill would make water polluters pay for permits](#)

efforts to cut a 30-percent tax on parking at and around Detroit Metro Airport. Critics of the 1988 tax say it has outlived its purpose, but Wayne County officials warn that the tax cut would force the county to end its health care program for indigents.

By far the most controversial action taken Thursday was the 21-14 Senate vote on a resolution encouraging Gov. John Engler to negotiate a casino compact with an Indian tribe in Allegan County.

The House voted 58-47 on Tuesday to approve its own resolution encouraging the governor to set up a contract for a casino run by the Match-e-be-nash-she-wish Band of Potawatomi Indians, also known as the Gun Lake Band. Backers of the casino said it will provide a boost to the economy in southwest Michigan. But it faced widespread opposition from residents and representatives of west Michigan for various reasons, including fears that it could undermine attempts to maintain a vibrant downtown district in Grand Rapids.

A casino in Allegan County's Wayland Township would offer more than 4,300 jobs, tribal chairman D.K. Sprague said. The tribe expects 2.9 million customers a year would visit the casino and spend about \$31.2 million in the area.

A group called the Michigan Gambling Opposition, which claimed to have thousands of anti-casino petition signatures, demonstrated at the Capitol earlier in the week, to no avail.

"We're having this pushed upon us," said Todd Boorsma, the group's head.

The Gun Lake Band was recognized as a sovereign Indian nation by the federal government in 2000. Engler plans to review the resolutions and could sign a compact with the tribe before he leaves office on Jan. 1, spokeswoman Susan Shafer said.

PROPOSAL DELAYED: In other business, the Legislature delayed final action on the proposal

that would allow the transfer of hundreds of hospital beds from Detroit to the suburbs.

The House voted 76-29 in favor of revision in the state's Certificate of Need program to make it easier and faster to authorize hospital construction and other medical-care advances. Five members didn't vote.

A House-Senate conference committee was expected to complete action on the bill today.

TRADE SOUGHT: Senate Republicans wanted to trade support for the DARTA bill for Democratic approval of laws that would raise the number of charter schools allowed in the state and extend the tenure of the appointed Detroit schools board.

"It's disappointing that something of this nature is being used as a vehicle to accomplish something else. But this is politics," said Richard Blouse, president of the Detroit Regional Chamber.

The DARTA bill would create a Detroit Area Regional Transportation Authority, with the aim of improving transit for southeast Michigan.

While negotiators and lobbyists tried to make deals, much of the day was devoted to farewell speeches by dozens of veteran lawmakers who were serving their final hours in decades-long careers.

In the Senate alone, 28 of the 38 members -- with a combined 464 years of service -- are leaving because of term limits at the end of the year.

>Contact **DAWSON BELL** at 313-222-6609 or dbell@freepress.com. *The Associated Press contributed to this report.*

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TAB C

The following opinion is presented on-line for informational use only and does not replace the official version. (Mich Dept of Attorney General Web Site - www.ag.state.mi.us)

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

CONSTITUTIONAL LAW:

GAMBLING:

GOVERNOR:

INDIANS:

LEGISLATURE:

Necessity and extent of legislative approval of tribal-state gaming compacts

Under Const 1963, art 4, legislative approval is necessary in order for the State of Michigan to validly bind itself to a tribal-state gaming compact under the Indian Gaming Regulatory Act.

Under Const 1963, art 4, legislative approval of a tribal-state gaming compact under the Indian Gaming Regulatory Act requires a statutory enactment by the Michigan Legislature.

Opinion No. 6960

October 21, 1997

Honorable John D. Cherry, Jr.
State Senator
The Capitol
Lansing, MI

Honorable Kirk A. Profit
State Representative
The Capitol
Lansing, MI

You have asked whether legislative approval is necessary under Const 1963, art 4, in order for the State of Michigan to validly bind itself to a tribal-state compact under the Indian Gaming Regulatory Act and, if so, whether such approval requires a statutory enactment by the Michigan Legislature.

Your inquiry was prompted by a series of proposed Indian gaming compacts recently negotiated by the Governor with several Michigan Indian tribes. Each of the proposed compacts contains a provision making its effectiveness contingent upon "[e]ndorsement by the Governor of the State and *concurrence in that endorsement by resolution of the Michigan Legislature.*" (Emphasis added.) Your inquiry expresses concern as to whether a legislative joint resolution is sufficient for the state to validly bind itself to the proposed compacts.

The Indian Gaming Regulatory Act, 25 USC 2701 *et seq* (IGRA), provides, *inter alia*, that if an Indian tribe wishes to

conduct casino or similar gaming operations on Indian land, it must first attempt to negotiate a gaming compact with the state in which that land is located. Section 2710(d)(3)(A). If a compact is successfully negotiated with the state, it is then submitted to the United States Secretary of Interior for review and approval, and if approved, it is published in the Federal Register, and thereby "take[s] effect." Section 2710(d)(3)(B).

Although the IGRA is quite specific in mandating that, upon receipt of a tribal request to negotiate a gaming compact "the State *shall negotiate* with the Indian tribe in good faith to enter into such a compact," section 2710(d)(3)(A), the Act is silent on the question of what process must be followed by a state in order to effectively bind itself to such a compact. (Emphasis added.) In *Pueblo of Santa Ana v Kelly*, 104 F3d 1546 (CA 10, 1997), *cert den* ___ US ___; ___ S Ct ___; ___ L Ed 2d ___; 1997 US LEXIS 4578 (October 6, 1997), the court addressed this omission by Congress and concluded that it was deliberate.

IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact. See *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 493 & n. 39, 58 L Ed 2d 740, 99 S Ct 740 (1979) . . . We agree with the district court that IGRA's very silence on this point supports the view that "*Congress intended that state law determine the procedure for executing valid gaming compacts.*" *Pueblo of Santa Ana*, 932 F Supp at 1294.

104 F3d at 1557-1558 (emphasis added) (footnote omitted).

Therefore, the court concluded, one must look to state law to determine what process is necessary to effectively bind the state to the terms of a proposed gaming compact.

The same conclusion has been reached, either explicitly or implicitly, by the various state courts that have examined the issue of the validity of such compacts. See, e.g., *Kansas, ex rel Attorney General v Governor*, 251 Kan 559, 583; 836 P2d 1169 (1992); *Narragansett Indian Tribe of Rhode Island v Rhode Island*, 667 A2d 280, 282 (RI, 1995); *New Mexico ex rel Clark v Governor*, 120 NM 562, 571; 904 P2d 11 (1995). Each of these state cases, moreover, has concluded, as a matter of state constitutional law, that the approval by a state of a tribal-state gaming compact under the IGRA is legislative in character, thereby requiring the exercise by the state legislature of its formal lawmaking power.

An examination of the terms of the proposed compacts at issue compels a similar conclusion under Michigan law. A major purpose of the proposed compacts is to authorize the Indian tribes to conduct specific casino gaming activities which would, absent the compacts, be in clear violation of several Michigan statutes. The proposed compacts further establish numerous requirements to be met in the management and operation of Indian gaming facilities, regulate the types and sources of gaming equipment that may be used, provide for arbitration of disputes that may arise under the compacts, subject the gaming operations to state liquor licensing and control laws, and commit the tribes to make semi-annual payments to the state and to local units of government. These provisions, purporting to be binding upon the state, are clearly legislative in character.

Pursuant to Const 1963, art 4, § 1, "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." In order to protect the integrity of the legislative process, the People have, through the Constitution, imposed specific requirements upon the exercise of this power. Const 1963, art 4, §22, requires that "[a]ll legislation shall be by bill and may originate in either house." Const 1963, art 4, §26, requires that no bill shall become law without concurrence of a majority of the members of each house.

No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house.

Finally, Const 1963, art 4, § 33, provides that "[e]very bill passed by the legislature shall be presented to the governor before it becomes law," and the governor must be afforded the opportunity to either approve or veto the bill.

In light of these provisions contained in Michigan's present Constitution, as well as in its predecessors, it has long been

established law in Michigan that a mere legislative resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." *Becker v Detroit Savings Bank*, 269 Mich 432, 434-435; 257 NW 853 (1934), quoting with approval from *Mullan v State*, 114 Cal 578; 46 P 670 (1896). See also, *Boyer-Campbell Co v Fry*, 271 Mich 282, 296; 260 NW 165 (1935), and *United Ins Co v Attorney General*, 300 Mich 200, 205-206; 1 NW2d 510 (1942). This point was recently reiterated by the Michigan Court of Appeals in *Blank v Dep't of Corrections*, 222 Mich App 385, 396-397; 564 NW2d 130 (1997), where the court stated:

In Michigan, Const 1963, art 4, § 1 provides that "the legislative power of the Sate of Michigan is vested in a senate and a house of representatives." Const 1963, art 4 §22 provides that "all legislation shall be by bill and may originate in either house." According to Const 1963, art 4, §26, "no bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Then, pursuant to Const 1963, art 4, § 33, "every bill passed by the legislature shall be presented to the governor before it becomes a law" Even when the Legislature acts by concurrent resolution, it is not making "law". Such resolutions are not "bills," and are not presented to the Governor for approval as required by article 4 of our constitution.

It is my opinion, therefore, that under Const 1963, art 4, legislative approval is necessary in order for the State of Michigan to validly bind itself to a tribal-state gaming compact under the Indian Gaming Regulatory Act.

It is my further opinion that under Const 1963, art 4, legislative approval of a tribal-state gaming compact under the Indian Gaming Regulatory Act requires a statutory enactment by the Michigan Legislature.

FRANK J. KELLEY
Attorney General

<http://opinion/datafiles/1990s/op10030.htm>

State of Michigan, Department of Attorney General

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TAB D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS
OF WISCONSIN, RED CLIFF BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS
and SAKAOGON CHIPPEWA COMMUNITY
(MOLE LAKE BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS),

Plaintiffs,

OPINION AND ORDER

02-C-0553-C

v.

UNITED STATES OF AMERICA,
U.S. DEPARTMENT OF THE INTERIOR,
THE HONORABLE GALE NORTON,
Secretary of the Department of the Interior,
and JAMES H. McDIVITT, Deputy Assistant
Secretary/Indian Affairs,

Defendants,

and

JAMES E. DOYLE,¹ Governor of the State of Wisconsin,
and THE STATE OF WISCONSIN,

Defendant-Intervenors.

¹Pursuant to Fed. R. Civ. P. 25(d)(1), Governor James E. Doyle has been substituted for his predecessor in office, Governor Scott McCallum.

This is a civil action for declaratory relief in which three Wisconsin Indian tribes, Lac Courte Oreilles Band of Lake Superior Chippewa, Red Cliff Band of Lake Superior Chippewa and Sakaogon Chippewa Community or Mole Lake Band of Lake Superior Chippewa, are challenging the constitutionality of the gubernatorial concurrence requirement in the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A). Plaintiffs contend that Congress's inclusion of such a provision is an unconstitutional delegation of power, or, alternatively, that it violates the appointments clause, Art. II, § 2; the Tenth Amendment; and the Fifth Amendment equal protection clause. Plaintiffs raise a common law claim as well, contending that the gubernatorial concurrence requirement is a congressional breach of trust.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, represents Congress's attempt to balance the competing interests of Indians, states and the federal government in the conduct of gaming activities on Indian lands. The resulting legislation is intended to promote tribal economic development, self-sufficiency and strong tribal government, § 2702(1), and to provide clear standards for the regulation of gaming, § 2702(2). The basic framework of the law is the division of Indian gaming into three classes. Class I games are social or traditional games played in connection with tribal ceremonies or celebrations over which the tribes have exclusive regulatory authority. Class II games include bingo-related and card games. Tribes may conduct these games and offer them to the public, if the state in which the tribal lands are located permits such gaming for any purpose. Class III games

include all gaming not included in the other two classes, such as casino-type games, parimutuel betting and lotteries. Tribes may offer these games only if (1) such gaming is authorized by a tribal ordinance approved by the chair of a commission that is established by the Act; (2) it is located in a state that permits such gaming; and (3) it is conducted in conformity with a tribal-state compact, negotiated by the tribe with the governor of the state. 25 U.S.C. § 2703.

Congress did not limit all gaming to existing Indian lands. It provided a mechanism for tribes to offer gaming on land that they did not own as of 1988, when the Gaming Regulatory Act became effective. 25 U.S.C. § 2719. The statute prohibits all gaming on such land, with certain exceptions. Under the one relevant to this case, the Secretary of the Interior may reach a determination that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. Before making such a determination, the Secretary must consult with the Indian tribe and appropriate state and local officials, including officials of other nearby Indian tribes. In addition, "the Governor of the State in which the gaming is to be conducted [must concur] in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

It is this concurrence requirement that plaintiffs are challenging as unconstitutional and a breach of trust. The case is before the court on (1) plaintiffs', defendants' and

defendant-intervenors' cross-motions for judgment on the pleadings; and (2) plaintiffs' "conditional" motion to amend their complaint. The states of Alabama, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Minnesota, Michigan, Nebraska, Nevada, New Jersey, New Mexico, Oregon, South Dakota, Texas, Vermont, Washington and Wyoming have filed a joint amicus curiae brief in opposition to plaintiffs' motion for judgment on the pleadings.

I conclude that the gubernatorial concurrence of the Indian Gaming Regulatory Act does not violate the non-delegation doctrine because the legislation expresses the will of Congress and provides an intelligible principle by which it can be determined that it is Congress's will that is being carried out; it does not violate the appointments clause because it does not diffuse executive power; and it does not conscript governors into federal service in violation of the Tenth Amendment. Therefore, the provision does not violate the Constitution. (Plaintiffs have not pursued their contention that the legislation violates the equal protection clause of the Fifth Amendment.) It is not a congressional breach of trust because it was enacted by Congress pursuant to the federal government's plenary powers over Indians. Furthermore, plaintiffs cannot challenge the alleged breach of trust because such a suit would be barred by the government's sovereign immunity.

I will grant defendants' and defendant-intervenors' motions for judgment on the pleadings and deny plaintiffs' motion for judgment on the pleadings. I will deny plaintiffs'

conditional motion to amend the complaint. The motion is untimely and probably futile.

The parties agree that there are no disputed facts and that the motions can be decided as a matter of law.

BACKGROUND

In October 1993, plaintiffs submitted an application to the Secretary of the Interior, asking that the federal government take certain land into trust for them, as the Secretary is authorized to do under the Indian Reorganization Act of 1934, 25 U.S.C. § 465. Plaintiffs sought to establish an off-reservation gaming casino at an existing greyhound racing facility in Hudson, Wisconsin.

On July 14, 1995, the Secretary rejected plaintiffs' application. Plaintiffs objected to the Secretary's rejection and filed suit in this court, see Sokaogon Chippewa Community v. Babbitt, 961 F. Supp. 1276 (W.D. Wis. 1997) (bands made sufficiently strong showing of improper influence on agency decision to be entitled to extra-record discovery and examination of agency personnel). While portions of the lawsuit were still pending and after congressional investigations and hearings, the parties settled their dispute on October 8, 1999. As part of the settlement agreement, the Secretary vacated the July 14 rejection and agreed to resume consideration of plaintiffs' application.

On February 20, 2001, the Secretary determined that plaintiffs' proposal to conduct

gaming on lands to be acquired in trust was in the best interest of the Indian tribes and would not be detrimental to the surrounding community. See 25 U.S.C. § 2719(b)(1)(A). On May 11, 2001, one day after plaintiffs filed this lawsuit, then-Governor Scott McCallum formally advised the Secretary of his non-concurrence with her determination. See id. On June 13, 2001, the Secretary denied plaintiffs' application and invited plaintiffs to re-apply to acquire the subject land in trust for non-gaming purposes.

OPINION

A. Breach of Trust Claim

The bulk of plaintiffs' challenge to 25 U.S.C. § 2719 rests on constitutional grounds. Therefore, I will begin with their one non-constitutional claim, which is grounded on a common law breach of trust. See Clinton v. Jones, 520 U.S. 681, 690 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") (quoting Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944)). Defendants contend that no examination of this claim is necessary or even permissible because the federal government's sovereign immunity bars plaintiffs from suing on this common law claim. In order to decide whether defendants are correct, it is necessary to determine the nature of plaintiffs' breach of trust claim. Therefore, I will start

with a discussion of the claim and then take up the sovereign immunity defense.

Plaintiffs' breach of trust claim rests on the premises that (1) the federal government has underlying trust obligations to the Indians; (2) Congress cannot undermine those obligations to the Indians by claiming to be exercising its general powers when it is actually acting pursuant to its trust obligations; (3) even when Congress is exercising plenary powers over Indians, the courts have the authority to review any legislation to insure that it does not breach the government's trust obligations; and (4) in reviewing such legislation, courts can uphold it only if it is tied rationally to the fulfillment of Congress's unique obligations toward Indians. As it relates to this case, plaintiffs assert that Congress was acting in its role as a trustee when it enacted the gaming regulation at issue and that it violated its trust obligations to the Indians when it made the approval of gaming on after-acquired lands subject to the concurrence of a state governor.

It is true that the relationship between the United States and Indian tribes has been said to resemble that of guardian and ward, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. Mitchell (Mitchell II), 463 U.S. 206, 225 (1983) (referring to "undisputed existence of a general trust relationship between the United States and the Indian people"). Many statutes establish specific fiduciary duties for the federal government in relation to Indian tribes. See, e.g., United States v. White Mountain Apache Tribe, 123 S. Ct. 1126 (2003) (statute providing that former military post to be "held by the United

States” in trust for tribe); Mitchell II, 463 U.S. 206, (25 U.S.C. § 406(a) gives Secretary of Interior broad statutory authority to manage and sell reservation timber upon consideration of “the needs and best interests of the Indian owner and his heirs”; statute created fiduciary duty requiring compensation for damages sustained from Secretary’s breach of duties); cf. United States v. Mitchell (Mitchell I), 445 U.S. 535, 542 (1980) (Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-338, created only limited trust relationship between federal government and Indian allottee that did not “impose any duty upon the Government to manage timber resources”). However, plaintiffs are not arguing either that the Indian Gaming Regulatory Act imposes fiduciary duties on the federal government or that individual defendants Norton and McDevitt failed to carry out a fiduciary duty imposed on them by the Act. Their argument is a different one: the government’s general fiduciary duty to the tribes requires it to legislate in the interests of the tribes and of their sovereignty in every instance. The corollary of their argument is that the courts have the authority to review all Indian legislation to insure that it meets this standard.

As plaintiffs admit, Plts.’ Reply Br., dkt. #22, at 33 n.15, no court has ever invalidated a statute on the basis of the trust doctrine. However strong the arguments for holding the government to its stated fiduciary responsibilities or to giving the same kind of deference to the sovereignty of tribes as to that of states, see, e.g., Brad Jolly, The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues, 29 Ariz. St. L.J.

273 (1997); materials cited in Red Lake Band of Chippewa Indians v. Swimmer, 740 F. Supp. 9, 11-12 (D.D.C. 1990), the Supreme Court has held that the federal government has almost unlimited authority over Indian tribes. It may abrogate treaties and divest the tribes of their sovereignty. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 410-11 and n.11 (1980) (Congress has power to abrogate treaties with Indians); United States v. Wheeler, 435 U.S. 313, 323 (1978) (tribal sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance”).

In Sioux Nation, 448 U.S. 371, the Supreme Court discussed two lines of cases involving the government’s power over Indian property: those in which the United States is acting as trustee for the tribes, exercising its plenary powers over them and their property, “as it thinks is in their best interests,” id. at 408, and those in which it is exercising its power of eminent domain, taking Indian property within the meaning of the Fifth Amendment. Id. (citing Three Affiliated Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968)). In the former case, the question for the courts is whether the government has acted as a proper trustee: Did it exchange assets for other assets of equal value? In the latter case, the question is whether the government effected a taking and, if so, what the Fifth Amendment requires in the way of compensation for the taking. Neither situation is at issue in this case. Plaintiffs’ challenge to the Indian Gaming Regulatory Act does not focus on the government’s handling of tribal property but on the government’s

power to enact general legislation that intrudes on the tribes' sovereignty.

Plaintiffs acknowledge that Congress has the authority to enact general legislation that applies to Indians, Plts.' Br., dkt. #4, at 30 ("trust relationship does not insulate tribes from the reach of Congress' general legislative powers"), but they assert that when Congress enacted the gaming act, it did so pursuant to its trust obligations, not its general legislative powers. Plaintiffs do not back up this assertion with any statutory language or legislative history and they do not explain away the case law to the contrary. See, e.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47-48 (1996) ("Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis of the operation and regulation of gaming by Indian tribes" and did so pursuant to its powers under Indian commerce clause, U.S. Const., art. I, § 8, cl. 3); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian affairs"). When Congress legislates under this clause, the courts' reviewing authority is limited to determining the constitutionality of the legislation, as in Seminole Tribe (holding unconstitutional provision allowing suits against states or state officials for failure to negotiate compacts under gaming act as violative of Eleventh Amendment). It does not extend to reviewing the extent to which the legislation carries out the government's general trust duties to the tribes.

In addition to arguing that the government has a continuing trust duty to Indian

tribes when it regulates any Indian activity, plaintiffs rely on the Indian Reorganization Act of 1934, 25 U.S.C. § 465, which provides that lands acquired are “taken in the name of the United States in trust for the Indian tribe.” The reason for plaintiffs’ reliance is unclear. The statute does not apply to plaintiffs because the United States has not acquired the land at issue in trust. Even if it did apply, it imposes no specified fiduciary duties upon the United States. In that respect, it is like the General Allotment Act, which the Supreme Court has found creates only a limited trust without fiduciary duties. Mitchell I, 445 U.S. 535. See also Thomas v. United States, 141 F. Supp. 2d 1185, 1205 (W.D. Wis. 2001) (court not persuaded “that § 476 of the Indian Reorganization Act imposes fiduciary obligations on the United States as a trustee”).

Plaintiffs argue that the Indian Gaming Regulatory Act provides for extensive federal oversight and control of gaming on Indian land. Therefore, they assert, the Act is equivalent to the regulations in Mitchell II and gives rise to a fiduciary duty. Again, plaintiffs’ argument fails because the United States never acquired the subject land in trust for plaintiffs. Without a trust, there is no fiduciary duty. Even setting this logical infirmity aside, the Act itself does not create a fiduciary duty; it is a regulatory scheme that balances the competing interests of the states, the federal government and Indian tribes.

Congress enacted the gaming act in response to the Supreme Court’s decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), holding that Public

Law 280 states such as California had no authority to apply their gambling laws to Indian gaming. Under Pub. L. 280, Congress gave six states, including California and Wisconsin, jurisdiction over specified areas of Indian country within the states. Id. at 207. The states have broad criminal jurisdiction over offenses committed by or against Indians within all Indian country and jurisdiction over private civil litigation involving reservation Indians in state court, but no general civil regulatory authority. Id. at 207-08. California allowed many forms of gaming activities on non-reservation lands; therefore, the state “regulated” rather than “prohibited” such activities. Because states lack the authority to enforce civil regulatory laws on Indian lands and because Congress had not made state gambling laws applicable to Indian country, California had no jurisdiction over gaming on the Cabazon Band’s lands. The Court noted that Congress could give states jurisdiction over Indian gaming, id. at 207 (“state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided”), but made it clear that without congressional action, the states would have no way to prevent or regulate Indian gaming. See S. Rep. No. 100-446, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3071-72; see also Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 692 (9th Cir. 1997). Heeding this statement, Congress passed the Indian Gaming Regulatory Act, identifying its purposes as being:

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

Nothing in the Act indicates any intention by Congress to recognize or create a fiduciary duty. The Act does not create a situation in which the federal government holds resources in trust for the Indians. See Vizenor v. Babbitt, 927 F. Supp. 1193, 1201 (D. Minn. 1996) (“no fiduciary duty created by [Indian Gaming Regulatory Act’s] elaborate regulatory scheme”); Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1297 (D.N.M. 1996) (Indian Gaming Regulatory Act “does not in itself . . . impose duties upon the United States such as those applicable to private trustees”).

I conclude that plaintiffs cannot prevail on their claim that the United States breached any common law fiduciary duty to them when Congress passed the Indian Gaming Regulatory Act. Plaintiffs’ only other claims are constitutional in nature. Defendants do not deny that the United States has waived its sovereign immunity as to such claims. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690-91 (1949) (when “statute or

order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional," sovereign immunity does not prevent suit for declaratory relief against federal officer); see also Clark v. United States, 691 U.S. 837, 841 (7th Cir. 1982) (request for declaratory judgment that federal statute is unconstitutional "does not impose an intolerable burden on governmental functions" and is not barred by sovereign immunity).

Although I have concluded that plaintiffs' non-constitutional claim has no merit, I will address defendants' claim that it would be barred in any event by the federal government's sovereign immunity. As a sovereign, the United States cannot be sued without the consent of Congress. "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." White Mountain Apache Tribe, 123 S. Ct. at 1131-32; see also United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992) (statute must contain unequivocal waiver of immunity to permit suit against federal government).

In the Indian Tucker Act, 28 U.S.C. § 1505, Congress waived its sovereign immunity as to claims for money damages arising out of the federal government's breach of a statutory trust responsibility. Plaintiffs have no claim under this act, because they cannot prove a statutory breach of trust and they are not asking for money damages. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, waives sovereign immunity for claims based on final

agency actions. It is inapplicable because plaintiffs are challenging a legislative action rather than an agency action. See 5 U.S.C. § 701(b)(1) (“agency” does not include “Congress”).

Plaintiffs raise one additional argument that is related to their breach of trust argument but independent of it. Citing Littlewolf v. Lujan, 877 F.2d 1058 (D.C. Cir. 1989), plaintiffs contend that federal courts have the authority to review legislation that Congress enacts pursuant to its plenary power over Indian affairs to insure that the legislation does not breach Congress’s trust obligations. See id. at 1063 (Congress’s power is “subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions”) (citing Sioux Nation, 448 U.S. at 415) (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935)). Littlewolf does not help plaintiffs’ argument that their common law claim is not barred by sovereign immunity. The case involved a constitutional issue: whether certain legislation deprived Indians of their property interests without due process and effected a taking without just compensation. Id. at 1060.

Despite plaintiffs’ concession that their breach of trust claim is not a constitutional one, they drift into the constitutional arena when they argue that all Indian legislation must be tied rationally to the fulfillment of Congress’s unique obligation to the Indians. The “rational tie” argument comes from Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977), where the Court used it in connection with a constitutional claim that

certain Indian legislation violated equal protection and the just compensation clause under the Fifth Amendment. Id. at 85-90 (exclusion of Kansas Delaware Indian tribe from distribution of funds authorized by Congress to redress United States' breach of an 1854 treaty held not to violate equal protection under due process clause of Fifth Amendment). With one exception, plaintiffs have not cited any case in which a court reviewed legislation for a rational tie to Congress's trust obligations to the Indians when the legislation was not alleged to be unconstitutional. Morton v. Mancari, 417 U.S. 535, 555 (1974), which plaintiffs cite, is another equal protection case in which the Court held that an employment preference for Indians did not violate the due process clause of the Fifth Amendment. In fact, all of the cases cited by plaintiffs in opposition to defendants' sovereign immunity defense involve either a claim that a federal official has acted improperly in contravention of a controlling statute (a final agency action) or a claim that the government has effected an improper deprivation of property or violated equal protection (a constitutional violation). None involve a breach of trust arising out of the enactment of a statute.

Plaintiffs have cited only one case in which a court allowed a tribe to challenge an act as violative of Congress's federal trust responsibility to the Indians. In Swimmer, 740 F. Supp. 9, the court read Delaware Tribal Business Council, 430 U.S. 73, Littlewolf, 877 F. 1058, the Mitchell cases, 463 U.S. 206 and 445 U.S. 535, and a decision by the Court of Appeals for the District of Columbia in North Slope Borough v. Andrus, 642 F.2d 589 (D.C.

Cir. 1980), as permitting the Red Lake Band to sue the federal government on a claim seeking declaratory and injunctive relief for Congress's alleged violation of its special obligation to the Indians in passing the Indian Gaming Regulatory Act. Id. at 12-13. The court did not discuss the differences that might exist between bringing a challenge to an agency action concerning the handling of Indian property, as in Mitchell, or on a violation of the Constitution, as in Littlewolf and Delaware, and bringing a challenge to the gaming act that was based neither on the handling of property or an alleged constitutional violation. This deprives the case of any persuasive force. In fact, Swimmer seems to be an anomaly; it was not appealed and it has never been cited by any other court.

Plaintiffs have not shown any reason for finding that the United States has waived its sovereign immunity as to the common law breach of trust claim that they alleged and they have failed to show that such a claim would be viable. Therefore, as to this claim, their motion for judgment on the pleadings will be denied and defendants' and defendant-intervenors' motion will be granted.

B. Constitutional Claims

1. Delegation doctrine

Plaintiffs argue that the gubernatorial concurrence in the Indian Gaming Regulatory Act violates the delegation doctrine in two different ways. It impermissibly assigns the

function of acquiring land for gaming in trust for the Indians from the executive branch to state governors and it delegates authority to state governors without providing an intelligible principle to guide the governors' exercise of the delegated discretion. Defendants maintain that plaintiffs are wrong because (1) Congress has not usurped the executive branch's power for itself but rather delegated power to the state governor, a person not within the federal structure and (2) the gubernatorial concurrence constitutes "contingent legislation" and for this reason raises no delegation or separation of powers question.

Plaintiffs' first delegation argument rests upon Printz v. United States, 521 U.S. 898 (1997), the case in which the Supreme Court overturned the provision of the Brady Act requiring the chief law enforcement officer of each local jurisdiction to perform background checks on prospective handgun purchasers and perform certain other tasks on an interim basis until the national system became operative. The Court rested its decision on two grounds: the division of power between the state and federal governments and the separation of powers among the three branches of the federal government. In the first instance, commandeering local law enforcement officers to carry out congressionally directed tasks would violate the Tenth Amendment. In the second instance, the commandeering of local law enforcement officers to carry out Congress's legislative initiatives would undermine the power of the executive branch of the federal government, which under the Constitution has the authority to administer the laws that Congress enacts. Id. at 922.

The first Printz argument is best reserved for the discussion of plaintiffs' Tenth Amendment claim. The second requires little discussion. Although plaintiffs argue that the governors' concurrence provision transfers responsibility to fifty state governors "who are left to implement the program without meaningful Presidential control," Printz, 521 U.S. at 522, and is therefore exactly like the Brady Act provision overturned in Printz, their argument does not stand up to examination. In giving a say to the governors of states in which the Secretary of the Interior is considering taking lands in trust for Indian gaming, Congress was not giving state officials authority to execute congressional legislation, as in Printz. It was doing nothing more than giving the governors an opportunity to be heard on matters that affected the interests of their citizens, if they so chose.

I turn next to the second delegation of powers argument, that Congress cannot convey its lawmaking function to others. See Loving v. United States, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., art. I, § 1, and may not be conveyed to another branch or entity.") Chief Justice Rehnquist has described the doctrine as one that (1) requires Congress to make the important choices of social policy; (2) guarantees that when Congress does delegate authority, "it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion," Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (quoting I.W. Hampton, Jr., & Co. v. United States,

276 U.S. 394, 409 (1928)) (Rehnquist, J., concurring); and (3) gives reviewing courts ascertainable standards for testing the legitimacy of the delegated discretion. Id. As I have noted, defendants view the governors' concurrence provision as valid contingent legislation.

Certainly, contingent legislation is not unusual. Congress uses such legislation in many instances in which it cannot determine exactly when its exercise of legislative power should take effect. See, e.g., Hampton, 276 U.S. at 419 (upholding Congress's decision to give President authority to increase or decrease duties in order to equalize the difference between the cost of producing goods domestically and abroad). Congress can let other entities decide when the legislation should take effect, such as the executive branch, as in Hampton, or the tobacco growers in a certain area, as in Currin v. Wallace, 306 U.S. 1 (1939). Although in such instances, one might say that others are exercising legislative power, "it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution." Hampton, 276 U.S. at 407. The Court has distinguished between "the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law." Id. at 407 (quoting Cincinnati, W. & Z. Ry. Co. v. Commissioners of Clinton County, 1 Ohio St. 77, 88-89 (1852)). Congress cannot do the former but "to the latter no valid objection can be made." Id. See Field v. Clark, 143 U.S. 649, 694 (1892):

Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.

(Internal quotation omitted).

The Supreme Court has upheld a number of instances of contingent legislation. For example, it affirmed the constitutionality of the Tobacco Inspection Act, 7 U.S.C. § 511(d), which allowed the Secretary of Agriculture to designate certain tobacco auctions as interstate tobacco markets, contingent on the concurrence of at least two-thirds of the affected farmers, Currin, 306 U.S. at 15 (noting that “it [was] Congress that exercise[d] its legislative authority in making the regulation and in prescribing the conditions of its application”), and it approved legislation authorizing the Secretary of Agriculture to define milk marketing areas and propose marketing orders that could go into effect only if two-thirds of those affected approved. United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577-78 (1939).

Plaintiffs argue that the gubernatorial concurrence is not permissible contingent legislation like that in Hampton and Currin but rather an impermissible delegation of power closer to that found in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). In fact, Chadha is not at all similar. Chadha involved Congress’s attempt to give itself a one-house legislative veto over deportation decisions made by the Attorney General

of the United States. In overturning the statute, the Supreme Court held that the effort “had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch.” Id. 952. Congress could take such an action only by passage of legislation in both chambers and presentment to the President. Neither house of Congress had the power to require the Attorney General to deport an alien once the Attorney General had made a contrary determination in the exercise of legislatively delegated authority. In Chadha, the Court was not concerned with the legitimacy of the delegation that Congress had made to the Attorney General but with the legitimacy of Congress’s attempt to overrule the decisions the Attorney General made in the course of carrying out the delegated tasks. As a consequence, the case has little relevance to plaintiffs’ challenge to the Indian Gaming Regulatory Act.

Moving on to a different but no more persuasive argument, plaintiffs contend that the gubernatorial concurrence provision is not permissible contingent legislation because it does not contain an intelligible principle or standards to enable reviewing courts to determine whether it is the will of Congress that is being carried out or that of another person or entity. Plaintiffs’ argument focuses incorrectly on the nature of the concurrence rather than on 25 U.S.C. § 2719’s explicit provision that gaming shall *not* be conducted on after-acquired lands *unless* certain conditions have been met, one of which is the governor’s

concurrence. The statute fixes the limits of delegation “according to common sense and the inherent necessities of the governmental co-ordination.” Hampton, 276 U.S. at 406. Congress has exercised its legislative authority by requiring the governor to concur in the Secretary’s decision. It has prescribed the conditions that must be met before the general prohibition against gaming is lifted. See Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 695 (9th Cir. 1997) (gubernatorial concurrence in Indian Gaming Regulatory Act is permissible contingent legislation); United States v. Ferry County, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (upholding statute allowing Secretary of Interior to acquire land in trust for Indian tribe only if local county officials consented).

Plaintiffs fail to distinguish in any meaningful manner between the permissible contingency of two-thirds of the affected farmers in Currin and the gubernatorial concurrence in this case. In Currin, the statute provided that “[n]o market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting favor it.” Id. at 15. In this case, the statute provides that no gaming shall occur unless the Secretary makes a two-part determination and the governor concurs in that determination. 25 U.S.C. § 2719. Plaintiffs concede that this case would be analogous to Currin if § 2719 were contingent on a majority vote of the members of the applicant Indian tribes rather than a gubernatorial concurrence, without explaining how a two-thirds vote by the applicant Indian members would provide the standards that the gubernatorial concurrence lacks.

Plaintiffs argue that the Currin and Rock Royal line of cases is not relevant because those cases involved a vote of those to be regulated as opposed to a vote that permits one group to determine the law to be applied to another. They cite Carter v. Carter Coal Co., 298 U.S. 238 (1936), for the proposition that Congress violates the Constitution when it enacts legislation allowing one group to impose a law upon members of another group. Carter affords plaintiffs little help; it was a due process case in which the affected interests were constitutionally protected and the persons given the power to set maximum hours of labor and minimum wages for the entire coal industry. It is worth noting that the persons exercising the authority were private persons, although the delegation of powers discussion was not the basis for the Court's holding. The legislation at issue in Carter is nothing like the gubernatorial concurrence provision in the gaming act. A state's governor is not a private person imposing a law upon others; he or she is a state official representing the interests of all the state's citizens, including the members of Indian tribes. If Congress may delegate to tribal officials the power to regulate distribution of alcoholic beverages on reservation lands owned by non-members of the tribe, United States v. Mazurie, 419 U.S. 544, 554 (1975), it may condition legislation on the concurrence of a governor without violating the separation of powers doctrine.

2. Appointments clause

In an argument closely related to the delegation doctrine and also embedded in the principle of separation of powers, plaintiffs contend that the gubernatorial concurrence violates the appointments clause, U.S. Const. art. II, § 2, cl. 2, which gives the President authority to appoint “all . . . Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law.” The courts have read this provision as permitting only persons who are “Officers of the United States” to discharge functions properly discharged by officers. United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757 (9th Cir. 1993) (qui tam relators did not have so much governmental power that they required appointment in conformity with appointments clause). The Supreme Court has held that the appointments clause serves as a guard against one branch’s aggrandizement of its power at the expense of another branch and preserves constitutional integrity by preventing the diffusion of the appointment power. Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 878 (1991).

The appointments clause applies to (1) all executive or administrative officers; (2) who serve pursuant to federal law; and (3) who exercise significant authority over federal government actions. Buckley v. Valeo, 424 U.S. 1, 123-27 & n.162 (1976); see also Seattle Master Builders v. Pacific Northwest Electric Power & Conservation, 786 F.2d 1359, 1365 (9th Cir. 1986). Unless all three prongs of the Buckley test are met, there is no violation of

the appointments clause. Seattle Master, 786 F.2d at 1365.

The governor of Wisconsin was never appointed as a federal officer and he is not one in fact. His failure to concur in the Secretary's determination violated the appointments clause only if he was exercising significant authority *pursuant to the laws of the United States*, Buckley, 424 U.S. at 126, and he was vested with responsibility for vindicating public rights, id. at 140. Looking at the factors the court of appeals identified in Confederated Tribes, 110 F.3d at 697, I agree with that court that the authority a governor exercises under § 2719 is neither significant enough to require appointment as a federal officer nor exercised pursuant to the laws of the United States. The governor does not have the sole authority to enforce the Indian Gaming Regulatory Act; he or she concurs in or rejects a gaming proposal only on an episodic and infrequent basis; the Secretary of the Interior determines the federal interest in the project; and the governor has no power to require the Secretary to take land for gaming purposes. Id. Moreover, when the governor decides whether to concur or not, the governor is acting as a state official, performing a function that devolves on him only because of his state office: the determination of the state's position in relation to the Secretary's proposal to acquire lands for Indian gaming. Id.

In Buckley, 424 U.S. 1, by contrast, the Court was considering the roles of the members of the Federal Election Commission, which had "primary and substantial responsibility for administering and enforcing the [Federal Election Campaign] Act," record-

keeping, disclosure, investigative functions and extensive rule making and adjudicative powers. Id. at 110. In fact, the Act allowed the commission to “formulate general policy” and gave it “primary jurisdiction with respect to . . . civil enforcement.” Id. The Supreme Court found the Commission’s enforcement authority to be “both direct and wide ranging.” Id. at 111.

Seattle Master Builders, 786 F.2d at 1362, supports defendants’ argument that there is no comparison between the governor’s narrow and episodic role under § 2719 and the Federal Election Commission’s sweeping responsibility under the Federal Election Campaign Act. In that case, the petitioners challenged the creation of a regional energy conservation council that had certain authority over the Bonneville Power Administration, an agency of the federal government. The petitioners contended that the existence of the council violated the appointments clause because its members exercised significant authority over the federal government and were not appointed by the President. Id. at 1362-63. The Court of Appeals for the Ninth Circuit disagreed, holding that the council members were not officers subject to the appointments clause, but rather served under state law. Id. at 1365. The court noted that “the states ultimately empower the Council members to carry out their duties . . . [their] appointment, salaries and direction . . . are state-derived.” Id. at 1365. It concluded that “Buckley is about maintaining the separation of powers within the federal government. . . . Because Congress neither appoints nor removes the members of this Council, the balance

of powers between Congress and the President is unaffected.” See also United States v. Germaine, 99 U.S. 508, 512 (1879) (finding surgeon appointed by pension commissioner not subject to appointments clause because his job’s tenure, duration, emolument and duties were only occasional and temporary).

3. Tenth Amendment

As a preliminary matter, defendants dispute whether plaintiffs have standing to bring a claim that the gubernatorial concurrence provision conscripts state governors into federal service in violation of the Tenth Amendment. Because the question of standing is a somewhat murky one in this circuit and is immaterial given the lack of merit in the substantive claim, I will not address it. (The murkiness arises from the conflict between the Supreme Court’s holding in Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 144 (1939), that private corporations have no standing to assert their states’ sovereign rights, and the Court of Appeals for the Seventh Circuit’s decision in Gillespie v. City of Indianapolis, 185 F.3d 693, 700-03 (7th Cir. 1999), that a city police officer could raise a Tenth Amendment challenge to a federal statute prohibiting him from carrying a firearm because of his previous conviction of misdemeanor domestic abuse. Defendants argue that Tennessee Electric Power has never been withdrawn or overruled and that I must follow it and disregard Gillespie. They forget that, as a district court judge, I am bound by

the court of appeals' interpretation of Tennessee Electric. See Donohoe v. Consolidated Operating & Production Corp., 30 F.3d 907, 910 (7th Cir. 1994) (judges of inferior courts must carry out decisions of superior courts).)

The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. As is evident, the Tenth Amendment does not itself demarcate the boundary between state and federal authority. See New York v. United States, 505 U.S. 144, 156-57 (1992) ("The Tenth Amendment . . . is essentially a tautology."). Even when exercising one of its enumerated powers, Congress can run afoul of the Tenth Amendment by commandeering or conscripting state officials to carry out federal mandates. See id.; Printz v. United States, 521 U.S. 898 (1997). In other words, Congress may neither "compel the States to enact or administer a federal regulatory program," New York, 505 U.S. at 188, nor "conscript the State's officers directly" by assigning to them responsibility for enforcing federal laws, Printz, 521 U.S. at 935.

In New York, the Supreme Court struck down the Low-Level Radioactive Waste Policy Amendments Act, which required the states either to enact legislation providing for the disposal of radioactive waste or take title to the waste. The Court found that "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Id. at 176 (quoting Hodel v. Virginia Surface Mining

& Reclamation Assn., Inc., 452 U.S. 264, 288 (1981)). “No matter which path the State chooses, it must follow the direction of Congress.” Id. at 177. In Printz, the Court struck down provisions of the Brady Handgun Violence Protection Act that required state and local officers to perform background checks on those seeking to buy a handgun. Citing New York, the Court held that the federal government “may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” Printz, 521 U.S. at 935. The Court found that the Act “effectively transfers [the President’s] responsibility to thousands of [law enforcement officers] in the 50 states, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove).” Id. at 922-23.

The Indian Gaming Regulatory Act neither commandeers nor conscripts the governor (or the state) to enact or administer a federal regulatory program. The gubernatorial concurrence presents the governor with a true choice: he may either do nothing or concur in the Secretary’s two-part determination. See Turfway Park, 20 F.3d at 1415 (“[Interstate Horseracing Act of 1978] . . . does not require a State to do *anything* when presented with a request for its consent to off-track betting” and thus does not violate Tenth Amendment) (emphasis in original). Moreover, if the governor opts to do nothing the status quo remains intact. Unlike the “choice” presented by the statute in New York, the governor (or the state)

need not enact legislation, promulgate rules or enforce a federal regulatory program. The effect of the governor's inaction is to preserve the general federal prohibition of gaming on newly acquired off-reservation land. That result does not amount to "regulation." The gubernatorial concurrence does not offend the Tenth Amendment or principles of federalism.

4. Equal protection

Although plaintiffs asserted an equal protection claim in their complaint, they failed to argue it in their briefs. "Arguments not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999).

5. Severability

Because I find that the Indian Gaming Regulatory Act's gubernatorial concurrence provision, 25 U.S.C. § 2719(b)(1)(A), is constitutional, it is unnecessary to address the parties' severability arguments.

C. Conditional Motion to Amend Complaint

Plaintiffs have moved "conditionally" for leave to amend their complaint. The conditional event is a ruling by this court that the gubernatorial concurrence provision is

constitutional. Now that this has happened, plaintiffs want the opportunity to argue that the governor's non-concurrence is invalid because former Governor McCallum failed to concur with the Secretary's two-part determination that (1) "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members" and (2) "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Plaintiffs characterize former Governor McCallum as "not properly apply[ing] the two factors" and "completely ignor[ing] the standards provided by Congress." Plts.' Br., dkt. #22, at 51, 53.

Plaintiffs do not explain whether they are seeking to assert another claim or simply raising an argument that they failed to make during the briefing on the cross-motions for judgment on the pleadings. They argue first that they are not required to plead legal theories in their complaint and second, that they are *not* seeking to add any additional factual allegations to the complaint. Instead, they say that they wish to amend their complaint "to put the parties and the Court on notice that the already-alleged facts, in light of defendants' new position with respect to the interpretation of the statute at issue, give rise to a legal theory not addressed in the pending motions for judgment on the pleadings, a theory that may become ripe depending on how those motions are resolved." Plts.' Reply, dkt. #31, at 3. It appears that plaintiffs are attempting to cloak an undeveloped argument as a "claim" that needs to be added to the complaint.

Whatever the true nature of plaintiffs' proposed amendment, it comes too late in this suit. Plaintiffs filed this lawsuit on May 10, 2001, and filed their first amended complaint on July 2, 2001. Plaintiffs assert that they could not have amended their complaint earlier because they needed to know whether this court found the gubernatorial concurrence constitutional but fail to explain why they had to know the validity of the concurrence before making their argument. It is reasonable to expect counsel to make all their arguments at one time, even if some of the arguments are conditional upon the outcome of others.

Although leave to amend a complaint should be freely granted when justice so requires, see Fed. R. Civ. P. 15(a), a court need not allow an amendment when there is undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or when the amendment would be futile. Bethany Pharmacal Co., Inc. v. QVC, Inc., 241 F.3d 854, 860-61 (7th Cir. 2001). At a minimum, plaintiffs' motion comes within the category of undue delay. As plaintiffs concede, the factual basis of their new claim is identical to the factual basis of their constitutional and breach of trust claims; therefore, plaintiffs could have brought this new claim at the time they filed their original complaint. See Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618, 625 (7th Cir. 1987) ("In view of [plaintiff's] failure to adequately explain the unreasonable delay in moving to amend his complaint to state a claim for punitive damages when all of the information necessary to stating such a claim has been available to him for eighteen months, we agree with the judgment and

reasoning of the district court that [plaintiff's] motion represents an apparent attempt to avoid the effect of summary judgment [on his other claims].") (Internal quotation marks omitted).

Former Governor McCallum is no longer a party to this case. He intervened in his official capacity; under Fed. R. Civ. P. 25(d)(1), his successor, James E. Doyle was substituted as a party. Moreover, plaintiffs have not explained what kind of a claim they would be bringing against McCallum (or against the other defendants for McCallum's alleged failure to carry out his duty properly). They are seeking declaratory and injunctive relief; McCallum is no longer governor and therefore not in a position to provide such relief. Neither the state nor present Governor Doyle would be proper defendants; they are not accused of violating the law. Plaintiffs cannot sue the federal defendants under 42 U.S.C. § 1983 because § 1983 actions can be maintained only against persons who take action under color of *state* law to violate the constitutional rights of others. Plaintiffs cannot sue any of the defendants under the federal Administrative Procedure Act; that act cannot provide a jurisdictional basis for a claim that a state governor acted improperly. Plaintiffs' conditional motion to amend their complaint will be denied for undue delay and for plaintiffs' failure to show that allowing such an amendment would not be a futility.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion for judgment on the pleadings is DENIED;
2. Defendants' and defendant-intervenors' motion for judgment on the pleadings is GRANTED;
3. Plaintiffs' conditional motion to amend the complaint is DENIED; and
4. The clerk of court is directed to enter judgment in favor of defendants and defendant-intervenors and close this case.

Entered this 22d day of April, 2003.

BY THE COURT:

Barbara B. Crabb
BARBARA B. CRABB
District Judge

TAB E

*Market and Economic
Impacts of a Tribal Casino
in Wayland Township,
Michigan*

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Executive Summary

PURPOSE

Anderson Economic Group undertook an assessment of the impact that a proposed tribal casino in Wayland Township would have on Michigan's economy. This study complements our critical review of the economic impact study submitted to the Bureau of Indian Affairs (BIA) by the Match-E-Be-Nash-She-Wish Tribe, also known as the Gun Lake Band of Potawatomi Indians.

This report, commissioned by the Grand Rapids Area Chamber of Commerce, is intended to provide a realistic look at the economic impact of the casino. Anderson Economic Group limits its analysis to the economic and market issues involved with the development of the subject casino. We refrain from taking a side for or against casino development or gaming.

METHODOLOGY

Our analysis can be broken into two main parts. First, we begin by assessing the market for the Wayland Township Casino that the Gun Lake Band proposes. Then, we produce an economic model to simulate the impacts of the casino operations. Below is a summary of our methods used to complete each step.

Assessing the Market for Casinos

We incorporate the rigorous analytical techniques and data standards that we use in market studies for other industries into our casino impact study methodology. Although we recognize that no approach can ever model the market with complete accuracy, our methodology introduces a level of analytical thoroughness that exceeds that of other studies we have reviewed.

We begin by conducting a comprehensive analysis of the competitive casino market in Michigan and Northern Indiana. We use the same methodology to assess the market areas of all competitive casinos, including Wayland, and consider the effect that each casino will have on population groups included in the Wayland project's market area. A careful analysis allows us to distinguish market impact due to the Wayland Township project from impact attributed to one of its competitors.

We run our analysis under two competitive scenarios. Scenario One accounts for competition from existing casinos. Scenario Two accounts for competition from existing casinos, as well as new facilities in New Buffalo and Emmett Township. For each of these scenarios, we estimate the following figures:

1. Gaming expenditure at the Wayland casino (projected Wayland revenue);
2. Increase in total casino-gaming expenditure due to the introduction of the Wayland facility; and

3. Cannibalization of revenue from other casinos due to the introduction of the Wayland facility.

A detailed description of the methodology and conclusions from the market assessment are included in "Market Assessment" on page 8. In this section, we also include maps of the Wayland Township trade area, and the trade areas of its competitive casinos.

Determining Economic Impact

We use a sophisticated economic model to estimate the sources of casino revenues, the uses of the casino revenue, and related expenditures by out-of-state visitors traveling to the casino. The model also includes construction expenditures made initially on the facility. This particular model is adapted from the fiscal and economic impact model and related methodologies we have developed for analyzing other projects.

The model is implemented in a mathematical and simulation software environment that allows us to predict, over numerous periods, the impacts of different variables, as well as allowing different variables to interact with each other. For example, we can allow casino revenue to grow over time, while taking into account that growing casino revenue implies similarly increasing displaced income in other industries.

The model schematic, in graphical form, and data inputs are presented in the appendix.

Defining Economic Impacts

Our firm has rigorously completed, and critiqued, numerous economic impact analyses. We depart from many other practitioners by insisting on a specific, conservative, and realistic definition of "economic impact." We define economic impact as *bona fide*, new economic activity directly or indirectly caused by the subject development. In calculating the effects, we take into account both benefits and costs. In particular, we subtract from the total benefit figure any reductions in economic activity due to displacement or substitution effects.

The resulting findings are much more conservative, and realistic, than many reported analyses that fail to subtract costs, ignore substitution effects, or exaggerate benefits.

In reporting our analysis, we also identify key assumptions, describe our methodology, and identify in the text any important factors that cannot or were not quantified in our analysis.

SUMMARY OF FINDINGS

Market Assessment Conclusions

Table 1 summarizes the revenue projections from our market analysis for the two scenarios described in the methodology. The table includes projections for the total casino revenue, and the sources for this revenue. Our results also show the amount of the casino revenue that is redirected from non-casino gaming activities, compared to the amount that is redirected from expenditure at other casinos.

TABLE 1. Summary of Market Analysis Results

Variable	Scenario One ^a	Scenario Two ^b
Total Wayland casino revenue	\$161,930,028	\$91,207,822
Revenue from expenditure shifted from other industries	\$92,163,963	\$42,387,576
Expenditure shift rate	57%	46%
Revenue from <i>cannibalization</i> of other casinos' probable revenue	\$69,766,065	\$48,820,246
Cannibalization rate	43%	54%

a. Assumes competition from existing casinos in Detroit, Mount Pleasant, Manistee, Traverse City, Leelanau Peninsula, and Michigan City (IN).

b. Assumes competition from existing casinos, plus proposed casinos in New Buffalo and Emmett.

Based on our analysis, we find that:

- In neither scenario is the expected revenue figure for the Wayland Township casino as high as the revenue figure reported by the tribe to the BIA.
- The projected Wayland Township casino revenue under Scenario Two is 46% below the revenue projection expected by the Tribe based on the market analysis it submitted to the US Bureau of Indian Affairs. This difference calls into question the financial viability of the casino's business plan as proposed.
- Between \$42- and \$92-million of the casino's projected revenue will be redirected from expenditure on non-casino-gaming goods and activities. Between \$49- and \$70-million will be redirected from expenditure at other casinos. These figures represent losses in other areas of the economy that must be accounted for in the economic impact analysis.
- The majority of casino revenue will come from Michigan residents under either scenario. These expenditures will displace income to persons in other industries, particularly entertainment, travel, food, and lodging.

Economic Impact Conclusions

The following tables show the net economic impact of opening the proposed Wayland casino by region. Table 2 compares the net economic benefit to Allegan County to the net economic loss to the rest of Michigan. Table 3 further breaks down the economic effect by region.

**TABLE 2. Summary of Net Economic Benefit, (\$Millions)
Allegan County compared to rest of Michigan**

Region	2004	2004 to 2014
Allegan County	97.5	1,185.9
Michigan (except Allegan)	(123.5)	(1,503.5)
Michigan Net Benefit (loss)	(26.10)	(317.57)

TABLE 3. Summary of Net Economic Benefit, by Region (\$Millions)

Region	2004	2004 to 2014
Allegan County	97.5	1,185.9
Barry County	(6.0)	(73.6)
Kalamazoo County	(4.4)	(53.7)
Kent County	(49.7)	(605.2)
Ottawa County	(12.3)	(149.2)
Northern Michigan	(15.3)	(185.9)
Middle Michigan	(24.1)	(293.2)
Southeast Michigan	8.1	98.7
Other Southwest Michigan Counties ^a	(19.8)	(241.4)
Michigan Net Benefit (loss)	(26.10)	(317.57)

a. Berrien, Branch, Calhoun, Cass, St. Joseph, and Van Buren Counties.

Based on our analysis of net economic benefit, we find that:

- The areas outside of the immediate development area will experience a net economic loss due to the casino. This results from shifting local consumer expenditures to the casino, and away from other businesses in areas such as Kalamazoo, Ottawa and Kent Counties, and the Lakeshore.¹
- Wayland Township and Allegan County as a whole will experience a net positive economic impact from the proposed casino. In 2004 we expect the

impact to the county economy to be \$97.5 million. This figure includes payroll, return on investment, payments made to members of the tribe, purchases, economic spin off, and other economic activity. The benefit will likely be concentrated on the communities directly surrounding the casino. Some portions of the county economy, including the Lakeshore, may lose as economic activity is shifted away from other businesses. See Table 2 on page 4.

- The net benefits experienced by Allegan County will come at a cost of \$123.5 million in 2004, and \$1,503.5 million between 2004 and 2014, to the rest of the State of Michigan. See Table 2 on page 4.
- Kent County will experience the largest economic loss due to the opening of the Wayland casino. This is because much of the expenditure that otherwise would be directed to the Grand Rapids area economy without the casino, will be spent at the new casino in Wayland Township. Kent County will experience a net economic loss of \$49.7 million in 2004, and \$605.2 million between 2004 and 2014. See Table 3 on page 4.
- The overall net economic effect to the entire State of Michigan will be a loss of \$26.1 million in 2004, and \$317.6 million between 2004 and 2014. The loss represents a net transfer in economic activity outside of the state due to out-of-state payments to investors and management companies, purchases, and other expenditure that greatly exceed the expected revenue from out-of-state visits to the Wayland casino. See Table 3 on page 4.
- This overall net impact includes reasonable "multiplier" effects caused by new and displaces expenditures in Michigan, including payroll, purchases, and tourism-related expenditures by out-of-state visitors.

In addition to measuring the change in total net economic benefit to the State of Michigan and specific regions, we also determined the effect that the proposed casino would have on the State in terms of jobs lost or gained. Table 4 on page 6 shows the impact of the proposed Wayland Township casino on employment in Michigan.

1. Here, "Lakeshore" refers to Lake Michigan coastal communities such as Holland, Saugatuck, South Haven, and Grand Haven.

TABLE 4. Economic Impact to Michigan Jobs^a

Year	Total Jobs Gained ^b	Total Jobs Lost	Net Change in MI Employment
2004	3.173	4.912	(1.738)
2005	2.416	5.010	(2.594)
2006	2.464	5.110	(2.646)
2007	2.513	5.212	(2.699)
2008	2.564	5.316	(2.753)
2009	2.615	5.423	(2.808)
2010	2.667	5.531	(2.864)
2011	2.721	5.642	(2.921)
2012	2.775	5.755	(2.980)
2013	2.830	5.870	(3.039)
2014	2.887	5.987	(3.100)

a. These figures represent a difference in annual jobs. For example, if the casino were opened, we expect there to be 2.864 fewer jobs in the economy by 2010.

b. Total jobs gained and lost include direct, indirect, and tourism induced jobs. Total jobs gained in 2004 includes 805 construction jobs, although construction will likely be spread out over multiple years.

When we analyze changes to employment, we find that:

- Temporary jobs created through the construction of the casino will reduce the initial negative impact of the casino on Michigan employment. Through construction and the first year of operation, the casino will result in a net decrease of 1.738 Michigan jobs, compared to a net decrease of 2.594 to 3.100 jobs per year in the ten years following construction.
- The casino will result in the creation of between 46 and 56 tourism-related jobs. We consider tourism-related jobs to be those jobs created through the expenditure from out-of-state visitors. This results in a minor overall effect on the economy.
- To support one job, it requires more expenditure at a casino than at the average non-casino establishment. This is because a large portion of the casino expenditure is directed (1) out of state, and (2) to uses that have a lesser spin-off effect on the economy.

For detailed tables and figures displaying the inputs and outputs of our economic model, please see "Appendix A: Model Inputs and Results" on page 31 and "Appendix B: Figures" on page 41. Additionally, "Appendix C: Model

Schematic” on page 45 graphically outlines the model used in calculating economic impacts.

Cautions in the analysis

While our market study and economic impact analyses were completed using a rigorous methodology, it is based on a number of assumptions that should be considered when reviewing the results. These cautions are summarized in “Cautions in the Analysis” on page 25.

Market Assessment

**REVIEW OF GENERAL
METHODOLOGY**

The market assessment involves the analysis of market characteristics to determine (1) demand for the proposed facility in terms of visitors (customers) and (2) potential revenue. The basic steps involved in the analysis of a casino's market include:

1. Define relevant trade areas (the areas from which the casino will draw visitors).
2. Determine the gambling population within these trade areas based on the percentage of the adult population that will likely visit a casino annually.
3. Using a figures for the average number of casino visits by each casino visitor, determine the total number of casino visits per year.
4. Distribute the total projected annual casino visits between the subject casino and its competitors by using estimated market penetration or capture rates.
5. Determine the casino's annual revenue, using per-visit revenue (casino "hold") estimates, based in part on distance of the visitor from the casino.
6. Identify expenditure shifts from other activities and purchases, and cannibalization of revenue from other casinos.

We incorporate the rigorous analytical techniques and data standards that we use in market studies for other industries into the generally accepted casino impact study methodology. Although we recognize that no approach can ever model the market with complete accuracy, our technique introduces a level of analytical thoroughness that we have not seen in other casino impact studies.

We run our analysis under two scenarios. Scenario One accounts for competition from existing casinos. Scenario Two accounts for competition from existing casinos, as well as new facilities in New Buffalo and Emmett Township. For each of these scenarios, we calculate the following figures:

1. Annual Wayland Casino gaming visits;
2. Gaming expenditure at the Wayland casino (projected Wayland revenue);
3. Increase in total casino-gaming expenditure due to the introduction of the Wayland facility; and
4. Cannibalization of revenue from other casinos due to the introduction of the Wayland facility.

Our economic impact analysis uses the resulting factors as input variables in the model (see "Economic and Fiscal Impact Assessment" on page 20).

DEFINING MARKET AREAS

The technique used to define market areas differs widely. As a guide to determine the extent of a trade area, some analyses use distance rings; others use drive-time analysis; and others define a trade area based on political boundaries. Some of the analyses incorporate multiple trade areas for the subject casino, and some analyses extend this approach to consider multiple trade areas for each competitor.

Of all these approaches, the best analysis is the one closest to the actual market. This usually means using a reasonable methodology that can be applied to all of the competitive casinos in the area. Furthermore, it means acknowledging the overlap in market areas between multiple casinos. The use of drive times in the market area definition provides a better guide than the use of linear distances, as drive times provide an indication of both distance and travel time, which helps account for the cost to gamblers of traveling to a casino.

Wayland Township Casino Trade Areas

We define primary, secondary, and tertiary market areas for the proposed Wayland Township casino. These represent drive-time regions of 30 minutes, 1.5 hours, and 2.5 hours. The drive time analysis used to define these regions was completed using our in-house geographic information system (GIS). It was completed using the current network of roads, and assumes that drivers will adhere to the speed limit during their travels.² Our market areas are presented in "Map 1: Wayland Township Trade Areas" on page 11.

After defining the drive-time regions, we collect data on all block groups that fall within the areas.³ The use of block groups instead of a larger geographic regions allows for more precise market areas. Through this technique, we calculate demand for each of the 2,968 block groups located in the proposed casino's trade areas, and then aggregate the numbers to determine the demand for larger geographic areas, such as counties or states.

Accounting for Visitors from Outside the Trade Areas

In our assessment, we limit Wayland Township market area to a 2.5 hours drive time. This does not indicate that we believe no one from outside of the casino's tertiary market area will gamble at a new casino in Wayland Township. How-

2. The definition of a market area using these parameters is based on our methodology used in market assessments for other industries. We adopt this method to account for the unique characteristics of the casino market. The drive times used in the analysis are based upon generally accepted travel distances for regional tourism markets, and similar in scope to the regions from which other studies have reported that customers are drawn. For example, see: Indiana University School of Public and Environmental Affairs, "Indiana State Gaming Commission Study," 1999.

3. Block groups are the smallest geographic regions defined by the US Census Bureau.

ever, gamblers that drive over 2.5 hours to Wayland will be offset by the loss of Wayland-area gamblers to casinos that are farther than 2.5 hours away.

Given that many other Michigan casinos are located in “destination” locations, we feel this assumption to create conservative trade area definitions. For example, non-gambling tourism draws to Traverse City, Leelanau Peninsula, Petoskey, St. Ignace, Detroit, New Buffalo, and other locations may enable casinos in these locations to attract more gaming visits from the Wayland trade area than our model predicts.⁴

Competitive Casino Trade Areas

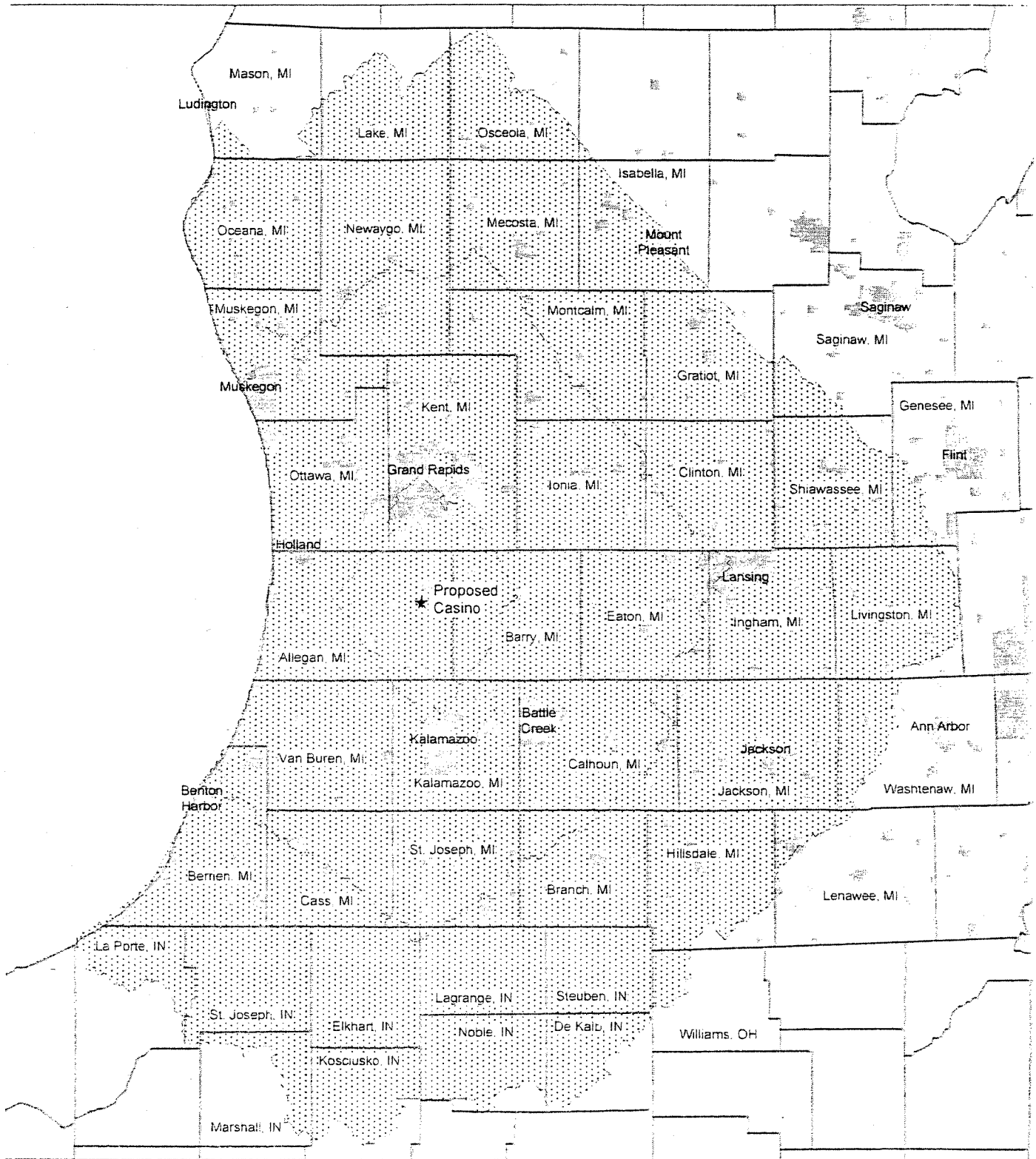
We also define primary, secondary, and tertiary market areas for each of the proposed casino’s competitors using the same drive-time analysis that we use for the subject development. Competitive casinos have at least one trade area that overlaps one or more of the proposed casino’s trade areas.






Using this approach, we find that a Wayland Township casino will compete with the existing casinos in Mount Pleasant, Manistee, Suttons Bay on the Leelanau Peninsula, Traverse City, Detroit (3 casinos), and Michigan City (IN), as well as planned casinos in New Buffalo and Emmett Township.

“Map 2: Competitive Casinos, Overlap of Influence Regions” on page 12 shows the overlap between the trade areas of competitive casinos. They are divided between two layouts to simplify the display of the information.

4. Although Allegan County includes a relatively tourist-rich Lakeshore, we do not consider Wayland Township to serve as a “destination” location. The time involved with travel between the Lakeshore and Wayland Township will prevent the casino from taking advantage of the existing tourism base.

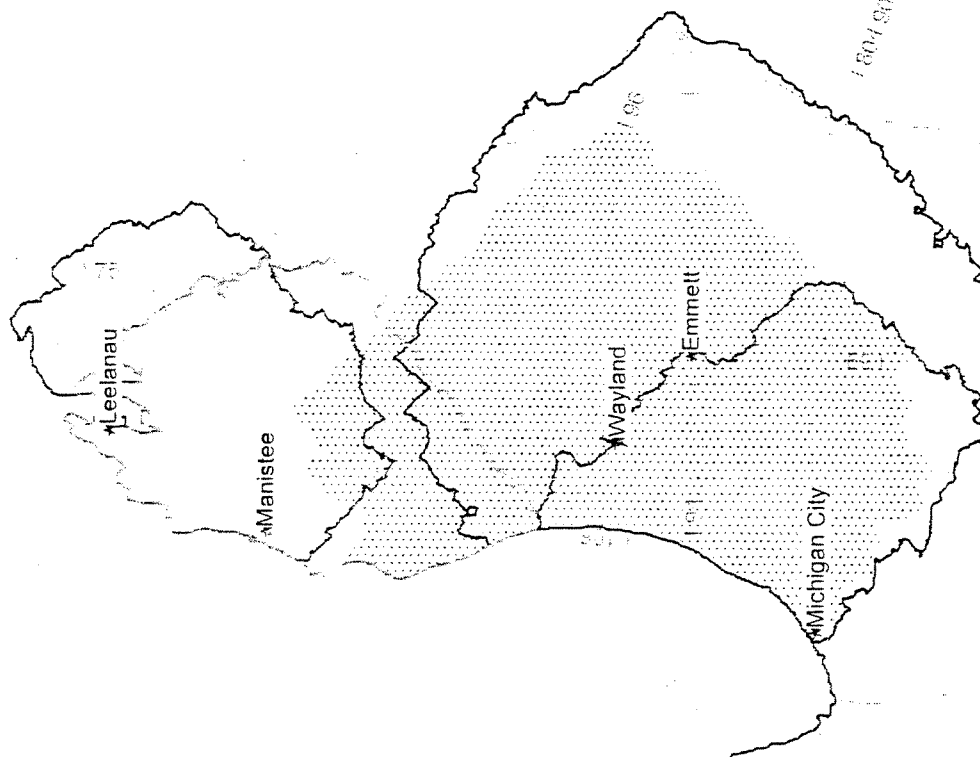
Map 1. Proposed Casino Trade Areas



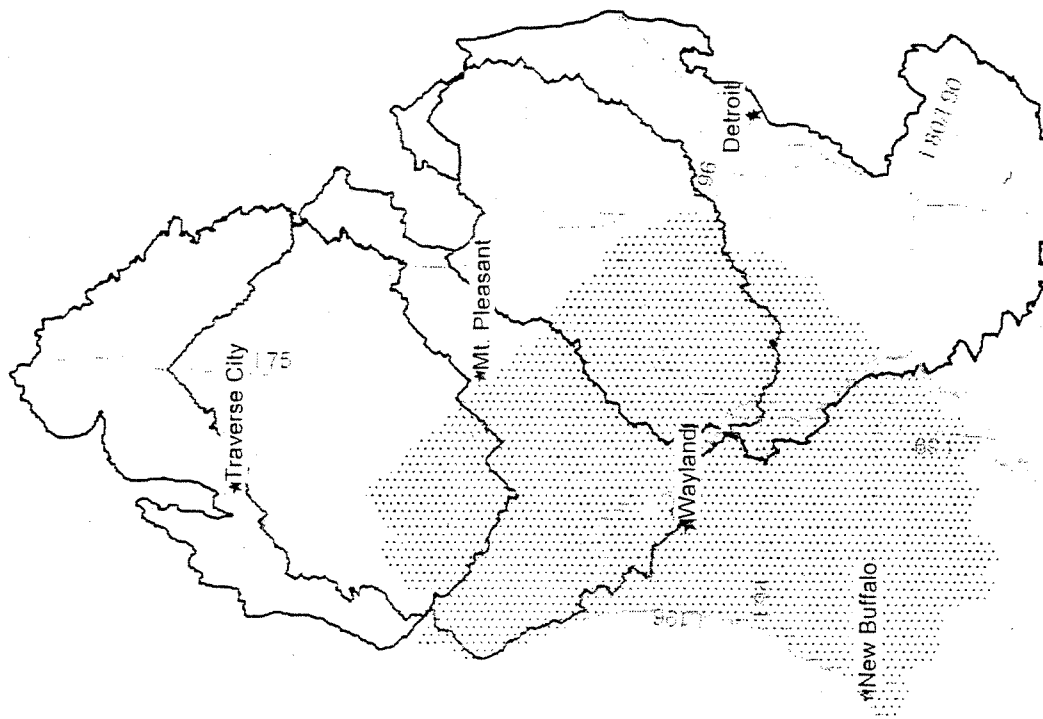
-  Primary Market Area
30-minute drive time
-  Secondary Market Area
90-minute drive time
-  Tertiary Market Area
150-minute drive time
-  Population Center
-  County

Source: Anderson Economic Group
Generated: 12-Feb 2003
www.AndersonEconomicGroup.com

COMPONENT CASINOS: OVERLAP OF MARKET AREAS



Source: Anderson Economic Group
 Generated: 12-Feb-2003
www.AndersonEconomicGroup.com
 * Indicates proposed casinos



Tertiary Market Areas by Casino Location

ESTIMATING CASINO DEMAND

Calculating Total Casino Visits

For each block group, we calculate total casino visits based on the adult population, its propensity to gamble, and the average annual number of casino visits per gambler. This estimation includes the following steps:⁵

1. Collect population data for each block group to determine the population greater than 21 years of age.⁶
2. Calculate the number of adult gamblers in each block group by multiplying the adult population by the percentage of the adult population that attend a casino annually. We estimate that 40% of Michigan's adult population gambles at a casino annually.⁷
3. Calculate the total number of casino visits per block group by multiplying the number of casino gamblers by the average number of visits per year. We assume that, on average, gamblers closer to a casino will go to a casino more often than gamblers located farther away from a casino. This assumption reflects reasonable market behavior, not just in the casino industry, but in other industries as well.

We account for the correlation between proximity to a casino and gaming frequency by determining the average number of casino visits based on the highest-level casino trade area in which a block group is located. If a block group is located in any casino's primary market area, we estimate that the average gambler within that block group will visit a casino 10 times per year. If its highest-level trade area is a secondary market area, we estimate that the average gambler will visit a casino six times per year. For tertiary market area casinos, the average number of visits is reduced to three.⁸

Table 1 on page 14 shows the average annual number of casino visits by the highest-level trade area in which a population group is located. Because the cost of visiting a casino increases with distance to the casino, gamblers far-

-
5. We used assumptions presented in the Gun Lake Tribe's submission to the Bureau of Indian Affairs. (Michigan Consultants, "Updated Economic and Community Impact Analysis: Allegan County Native American Casino," October 2002) unless we had other sources we believed were significantly more accurate.
 6. We use 2006 projections provided by Applied Geographic Solutions based on Census data and growth trends.
 7. 40% is based on the figures reported by the Gun Lake Tribe in its submission to the Bureau of Indian Affairs. However, we believe that this is likely a liberal representation of the market. We further discuss the use of this number in our "Critical Review: Gun Lake Band of Potawatami Indians Environmental Impact Study: Economic and Community Impact Analysis," which was submitted to the BIA on Monday, February 10, 2003.
 8. The average annual gaming visits shown in Table 1 on page 14 are adopted from the average numbers of 10, 5, and 3 used by KPMG in their assessment of similar projects. Because the Tribe's submission did not account for the relationship between distance and gambling frequency, we did not find its frequency assumptions reasonable.

ther from the casino are less likely to visit the facility as frequently as gamblers closer to the casino.

TABLE 1. Average Number of Casino Visits by Highest-Level Trade Area

Variable	Primary	Secondary	Tertiary
Annual Visits per Gambler	10	6	3

Applying Market Share Between Casinos

We define the trade areas for each casino by the Census block groups they include. For each block group we then determine all casino trade areas of which it is part. For example, a single block group may be included in Wayland Township's primary market area, Emmett's secondary market area, and the tertiary market areas of New Buffalo and Michigan City.⁹

We then determine the market share that each casino pulls from each block group. In order to determine the portion of a block group's casino visitors that will likely go to each casino, we apply assumptions regarding penetration rates and market shares. Table 2 shows the penetration rate assumptions that we use in determining the market share that is attributed to each of the competitive casinos, including Wayland.

TABLE 2. Penetration Rate Analysis

Relevant Market Areas	Primary	Secondary	Tertiary
Primary Only	100%		
Primary, Secondary	80%	20%	
Primary, Tertiary	95%		5%
Primary, Secondary, Tertiary	76.8%	19.2%	4.0%
Secondary Only		100%	
Secondary, Tertiary		63.5%	36.5%
Tertiary Only			100%

We use the rates from the table to determine the penetration that a casino in each of the trade areas have in each block group. These percentages must be weighted if there are multiple casinos within each category. For example, if a block group falls within the primary market area of one casino, and the tertiary market area of a second casino, the primary and tertiary market area casinos would capture 95% and 5% of the market respectively. However, if the block

9. Block group inclusion in a trade area definition is based on the location of the block group's geographic centroid. The small size of the block group compared to a trade area enables us to closely adapt the actual drive time analysis to our data sources. Any discrepancy to the resulting population figures is insignificant.

group falls within the primary market area of one casino, and the tertiary market area of three casinos, the percentages must be weighted to account for multiple trade area overlap. The total non-weighted penetration rate for the block group would be 110% (95% + 5% times three casinos). In order to account for this, we divide each of the penetration rate percentages by 110%. Therefore, the primary market area casino would capture approximately 86.4% of the market, and each of the three tertiary casinos would capture approximately 4.5% of the market.

To determine the number of visits that a block group's population makes to each casino annually, we multiply its total annual casino visits by each casino's local market penetration. For the purposes of our analysis, we calculate the number of visits to the Wayland casino separately, and aggregate the visits to other casinos into primary, secondary, and tertiary market area categories.

Calculating Casino Revenue

After determining the number of visitors that travel to casinos from each block group, we calculate total casino expenditure by block group, as well as casino expenditure (i.e., revenue) at the Wayland Township venue. We do this by assigning an average casino hold figure to each visit.¹⁰

We assume that the amount of money that a gambler spends at a casino increases with the distance that the gambler traveled to attend the facility. The same behavior is seen in a variety of other examples. For example, people that live far away from a retail mall are likely to shop less frequently, but purchase more items every time that they do travel to a mall.

Table 3 shows the assumed average casino hold based on which of the casino's market areas the gambler traveled from to attend the casino.¹¹

TABLE 3. Average Casino Hold by Visitor Trade Area

Variable	Primary	Secondary	Tertiary
Average Casino Hold by Visit	\$40	\$50	\$65

In each block group, we multiply the average hold figures by the number of casino visits attributed to casinos in the respective market areas.¹² This provides a total casino expenditure figure for the block group.

10. Average casino hold refers to the net casino revenue per gaming visit. We also refer to it as "customer loss" or casino "revenue."

11. The average hold figures are adopted based on the numbers presented in the tribe's impact assessment: Michigan Consultants, "Updated Economic and Community Impact Analysis: Allegan County Native American Casino," October 2002.

To determine expenditure at the Wayland Township casino, we multiply the total number of casino visits likely directed to the proposed casino by the average Wayland casino hold for the market area in which the block group is located. The sum of expenditure at the Wayland casino from all block groups gives total projected revenue for the casino.

MEASURING SHIFTS IN EXPENDITURE AND REVENUE

We run our analysis under two scenarios to account for different levels of potential competition. Scenario One accounts for competition from existing casinos. Scenario Two accounts for competition from existing casinos, as well as new facilities in New Buffalo and Emmett Township. For both of these scenarios, we calculate the following revenue figures:

1. Total market-area expenditure on casino gaming given no Wayland casino;
2. Total market-area expenditure on casino gaming given the entrance of the Wayland casino;
3. Gaming expenditure at the Wayland casino.

Based on the resulting figures, we estimate the portion of the proposed Wayland Township casino's estimated revenue that is redirected from (1) non-casino-gaming expenditure, and (2) casino-gaming expenditure at other facilities.

To measure the amount of new casino expenditure that the introduction of the Wayland project creates, we estimate the difference in total casino expenditure that results from the introduction of the Wayland casino. The increase in casino expenditure represents a shift in expenditure away from expenditure on other activities, purchases, and investments.

We determine the amount of the Wayland Township casino's proposed revenue that is pulled away from other casinos by comparing the projected revenue for the Wayland casino with the increase in casino expenditure that results from the introduction of the Wayland facility. The difference in these figures show the amount of the proposed casino's revenues that is "cannibalized" from expenditure at other casinos. Without the market entrance of the Wayland casino, this revenue will be directed to casino gaming at other venues.

12. A "primary market area casino" refers to a casino with a primary market area that includes the subject block group. A "secondary market area casino" refers to a casino with a secondary market area that includes the subject block group. A "tertiary market area casino" refers to a casino with a tertiary market area that includes the subject block group.

ANALYSIS RESULTS

Our technique introduces a level of thoroughness that we have not seen in other market studies for casino developments, and adopts the analytical standards we employ in market studies for other industries to the unique characteristics of a casino development.

We evaluate the market for the proposed casino under two scenarios. Scenario One accounts for competition from existing casinos. Scenario Two accounts for competition from existing casinos, as well as new casinos in New Buffalo and Emmett Township. Table 4 summarizes the result of our analysis.

TABLE 4. Summary of Revenue Results

Variable	Scenario One ^a	Scenario Two ^b
Total Wayland casino revenue	\$161,930,028	\$91,207,822
Revenue from expenditure shifted from other industries	\$92,163,963	\$42,387,576
Expenditure shift rate	57%	46%
Revenue from cannibalization of other casinos' probable revenue	\$69,766,065	\$48,820,246
Cannibalization rate	43%	54%

a. Assumes competition from existing casinos in Detroit, Mount Pleasant, Manistee, Traverse City, Leelanau Peninsula, and Michigan City (IN).

b. Assumes competition from existing casinos, plus proposed casinos in New Buffalo and Emmett.

Highlights from the assessment include:

- Without competing casinos in New Buffalo and Emmett, the Wayland casino revenue will likely exceed \$161 million per year of casino operation.
- The projected Wayland Township casino revenue under Scenario Two is \$91 million, 46% below the revenue projection expected by the Tribe, based on the market analysis it submitted to the US Bureau of Indian Affairs. This difference calls into question the financial viability of the casino's business plan as proposed.
- Between \$42 and \$92 million of the casino's projected revenue will be redirected from expenditure on non-casino-gaming goods and activities. Between \$49 and \$70 million will be redirected from expenditure at other casinos. These figures represent losses in other areas of the economy that must be accounted for in the economic impact analysis.

Results by Region

In the following section of the report, we measure the economic impact of the casino on specific counties and regions in the state. To prepare for this, we

aggregate our revenue results for the regions analyzed in the economic impact assessment.¹³

Table 5 shows the results of the analysis for Scenario One, which accounts for competition from existing casinos.

TABLE 5. Regional Revenue Results (given competition from existing casinos)

Region	Total Wayland Revenue	From Expenditure Shift	From Shift in Casino Revenue
Total Wayland trade area	\$161,930,074	\$92,163,956	\$69,766,118
Allegan County	\$8,770,557	\$5,642,740	\$3,127,817
Barry County	\$4,976,145	\$3,874,668	\$1,101,477
Kalamazoo County	\$13,571,973	\$9,658,084	\$3,913,889
Kent County	\$44,298,352	\$28,207,001	\$16,091,351
Ottawa County	\$12,469,084	\$9,788,773	\$2,680,311
Northern Michigan Counties ^a	\$10,746,674	\$7,492,264	\$3,254,410
Middle Michigan Counties ^b	\$17,462,969	\$11,438,388	\$6,024,581
Southeast Michigan Counties ^c	\$3,338,337	\$278,424	\$3,059,913
Other Southwest Michigan Counties ^d	\$20,805,301	\$11,083,833	\$9,721,468
Total Out-of-State	\$25,490,682	\$4,699,781	\$20,790,901

a. Revenue contributing counties include Isabella, Lake, Mason, Mecosta, Muskegon, Newaygo, Oceana and Osceola.

b. Clinton, Eaton, Genesee, Gratiot, Ingham, Ionia, Livingston, Montcalm, Saginaw and Shiawassee Counties.

c. Revenue contributing counties include Hillsdale, Jackson, Lenawee, and Washtenaw.

d. Berrien, Branch, Calhoun, Cass, St. Joseph, and Van Buren Counties.

If we account for competition from new casinos in Emmett and New Buffalo, the aggregate numbers are reduced. The level of reduction to each figure

13. Only counties that are included in the proposed casino's market area contribute to the casino's revenue. However, when we assess the net economic impact on these regions, we account for benefits to all counties in the region. For example, although our market assessment shows that Hillsdale, Jackson, Lenawee and Washtenaw Counties are the only Southeast Michigan counties to significantly contribute to Wayland casino revenue, we include gross benefit to the Detroit area in our analysis of the overall effect on the region.

depends on the proximity of the region to the Wayland casino, existing casinos, and new casinos in Emmett and New Buffalo.

Basis for Regional and Economic Impact Analysis

We use the Wayland casino revenue estimates from each region to calculate economic impact in the next section. Our analysis calculated economic impact under both scenarios; however, our discussion concentrates on the assumption that the Wayland casino will enter the market with the existing casinos only (Scenario One).

If Wayland enters the market along with other new casinos, its overall revenue—and both its positive and negative effects—will be smaller.

Economic and Fiscal Impact Assessment

PROPERLY DEFINING "IMPACT"

The economic impact of any new enterprise includes:

- The direct effect of *new* local purchases and payroll of the enterprise;
- The indirect effects attributable to the additional activity generated as purchases and payroll and re-spent in the regional economy; and
- The indirect and direct effects of *displaced* or *substituted* expenditures.

Unlike many economic impact analyses, we consider only *new* economic activity in the net economic impact. Activity that merely replaces or displaces other activity—purchases from one store that displace others—is subtracted out.

PROPER USE OF "MULTIPLIERS" FOR INDIRECT EFFECTS

Our analysis avoids the common errors that plague most "economic impact" analyses. For this analysis, we are careful to describe our use of economic "multipliers" in the model. We do so to illustrate the appropriate use of the multipliers.

Impact Analysis Avoids Common "Multiplier" Errors

This approach is much more conservative, and more accurate, than the common method of simply multiplying direct expenditures by a "multiplier" and ignoring all competitive and distributional effects. Our analysis of the Gun Lake Band's economic impact report filed with the Bureau of Indian Affairs (BIA) shows in some detail how taking all expenditures and multiplying them by two violates the assumptions under which impact multipliers are estimated.¹⁴

"Multipliers" in Economic Impact Analysis

Multipliers are appropriate for *bona fide* new economic activity in the state or region, and reflect the fact that a set of expenditures tend to be re-spent by their recipients, partially in the same region or state. Multipliers are not appropriate for activity shifted from one activity to another in the same region or state, because the displaced income would also be spent and re-spent regardless of the casino.

14. We excerpt in that report a number of sections of the US Bureau of Economic Analysis *RIMS II User Guide* in which the BEA explains the proper approach, and warns against including in the base of a multiplier analysis expenditures that are shifted from one activity to another. A complete copy of the report ("Critical Review: Gun Lake Band of Potawatomi Indians Environmental Impact Study: Economic and Community Impact Analysis," which was submitted to the BIA on Monday, February 10, 2003) is available online at <http://www.AndersonEconomicGroup.com>

Appropriate Multipliers on New or Displaced Income

While “multipliers” are commonly misused, there is an appropriate place for them in a correctly-performed economic impact analysis. In this analysis, we apply a multiplier to the following expenditures:

- The wage and salary earnings of casino employees in the State of Michigan
- The expenditures on purchases made in the State of Michigan for the operations of the casino.
- Expenditures made by out-of-state visitors on other goods and services while in the State of Michigan.
- The displaced income of Michigan residents, who shift their expenditures from other household goods and services to casino expenditures.

The only logically-consistent use of multipliers is to apply them to *both* “new” and “displaced” expenditures. This means applying multipliers to lost expenditure in other areas of the state, as well as new expenditures in Wayland Township.

Expenditures Not Multiplied

Some expenditures were not multiplied, because they were not likely to be re-spent in the same manner as payroll or purchase expenditures. These include profit distributions, gaming tax revenue, and management fees.

**CONSTRUCTION
ANALYSIS**

Our analysis properly segregates construction from operational activity. However, any construction analysis at this stage is speculative, because: (1) the actual facility plans are not available; and (2) our market analysis indicates that the likely revenue to the facility, if we assume that two competing facilities will open in the region, will be far less than that stated in the tribe’s economic impact analysis. This calls into question the financial viability of the project.

Should construction take place, the economic impact is likely to be positive for Michigan, and for Allegan and the surrounding counties, for the following reasons:

- The source of the funds for construction would likely be largely from out-of-state investors, or from financial intermediaries that draw on out-of-state funds.
- Much of the construction expenditure—though not all—would be made in Michigan.
- Should construction begin in the current economic climate, there would be relatively little substitution or displacement of other construction projects in the region.

METHODOLOGY AND MODEL

We use a sophisticated economic model to estimate the sources, the uses of the casino revenue, and related expenditures by out-of-state visitors traveling to the casino. The model also includes construction expenditures made initially on the facility.

This particular model adapts the methodologies we have developed for analyzing the impact of other projects, including:

- The expansion of the Detroit-Wayne County Port;
- Major industrial installations in various regions of the state;
- Work stoppages and strikes in the airline, marine transportation, and automotive industries; and
- New retailers in various states, and in the Caribbean Basin.

Implementation of the Model

The model is implemented in Matlab and Simulink, which is a mathematical and simulation software environment developed by Mathworks, Inc.¹⁵ This environment allows us to predict, over numerous periods, the impacts of different variables, accounting for complex interaction among the variables. For example, we can allow casino revenue to grow over time, while taking into account that growing casino revenue implies changes to the displaced income in other industries.

The model schematic is presented, in graphical form, in the appendix.

OUTLINE OF MODEL

Below, we describe each of the major building blocks in the model. These building blocks (or "subsystems") are illustrated in the schematic in the appendix.

1. Gaming Revenue

We first estimate gaming revenue, based on the results of the market assessment. This generates casino revenue from various geographic areas for the entire period.

In the schematic, gaming revenue is modeled by the box on the left. The outputs from the calculations in this subsystem are revenue from Michigan and non-Michigan sources.

2. Allocation of Casino Revenue

Using the market demand to forecast total expenditures, we allocate expenditures based on likely expense categories for a casino enterprise. The largest allocation is for payroll, with smaller amounts for purchases, gaming and other taxes, management fees, and profits.

15. The Mathworks web site is at: <http://www.mathworks.com>.

In the schematic, allocation of casino revenue is modeled in the box to the right of the gaming revenue subsystem.

3. Impact of Expenditures

The various allocations of expenditures are further apportioned between in-state and out-of-state expenditure, and, when appropriate, multiplied to account for re-spending in the region's economy. In particular, payroll and purchases in the state are multiplied to account for this re-spending.

This is done in the two boxes shown on the schematic, to the right of the "allocation of gaming revenue" subsystem.

4. Displacement Effects

Using the same market demand variables that drove casino expenditures, we calculate displaced income from various geographic sectors. For revenue from residents of the state, we multiply them to account for the loss of re-spending of those dollars.

In addition, non-Michigan revenue is multiplied by a factor that accounts for additional expenditure by those visitors in the state, and this is then multiplied by an additional multiplier to account for re-spending from the tourism industry.

This subsystem is at the bottom of the schematic, below the "allocation of gaming revenue" subsystem.

5. Net Benefits

Finally, we take all spending in Michigan—including the re-spending estimated by using multipliers for payroll, purchases, and tourism-related expenditures in Michigan—and collect them in the "net benefits" subsystem. We subtract the displaced income from losses in other industries from these gross benefits to residents of the state to arrive at net benefits to the state.

Then, using county- and region-specific allocation factors, we estimate the amount of the gross benefit that accrues to residents of different counties and regions. These amounts are compared to the gaming revenue supplied by residents of these same areas to arrive at net benefit estimates for each county or region.

The net benefits subsystem is at the far right of the schematic of the model in the appendix.

ASSUMPTIONS

We use a number of input variables in our model, including:

- Revenue sources by county and region. These are described in the market analysis section of the report.
- Allocation factors for payroll, purchases, management fees, investor returns (including profits), gaming taxes, and other taxes. These were estimated on the basis of similar enterprises for which data are available.¹⁶
- Shares of the expenditures by the casino operation that would accrue to Michigan residents. These ranged from very high (for payroll), to 20% (for management fees).
- Plant and property data, which is speculative at this stage, and was not a significant factor in the conclusions of the analysis.
- Construction payroll, which again is speculative and not a significant factor in the conclusions of the analysis.
- Payroll, benefits, and other employment expenses, which includes average wages & payroll taxes, benefit ratios, and annual wage increase assumptions that are intended to reflect the average across both direct and indirectly affected jobs. As a simplifying assumption, we used these same factors for both "new" and "displaced" jobs.
- Impact multipliers, including those for payroll, purchases, and tourism-related expenditures. These are reasonably conservative, though properly reflect the actual re-spending that will occur from the expenditures for both new and displaced income.
- County and regional benefit and cost shares.
- Various simulation parameters, including the 2004-2014 time period. Given the relatively low inflation rate assumption, the starting date is not critical in the analysis. However, as discussed in the market demand analysis, the presence or absence of competing casinos in the region is critical.

These are summarized in the tables in the appendix.

16. The best available source was the *Annual Financial Statement Studies*, 2002-2003 edition, published by RMA (Risk Management Associates, formerly Robert Morris Associates). We primarily used the data for SIC 7999: (NAICS 48711, 48721, 48799), which is for "entertainment, amusement, or recreation services," although the ratios for "coin operated amusements" are similar. Although we reviewed the data for "hotels," lodging is not a comparable enterprise to casino gaming. To the extent the facility, in future years, develops a substantial lodging and restaurant business, that portion of the impact could then be evaluated using data from the lodging and restaurant industries.

CAUTIONS IN THE ANALYSIS

We make a number of assumptions to simplify our analysis, and project future activities based on factors that cannot be known at this time. We identify below the most important cautions about the results of our analysis.

- As in any analysis of future economic activity, we assume baseline economic activity, residential patterns, road networks, and consumer preferences, as well as current laws. All of these factors will change, and some may change significantly.
- As noted in the market analysis section of the report, we do not know what competing casinos will open in the region. Furthermore, our analysis suggests that, should competing casinos in the region open, the proposed Wayland Township facility would likely not be feasible, and may need to be scaled back in size and scope.
- A proper economic impact analysis accounts for both new and displaced income. Should the project be completed, however, the direct new jobs will be more visible to the observer than the displaced jobs.
- We made a simplifying assumption that the aggregate number of new and displaced jobs could be estimated using the same average salary and benefit figures. The actual pattern of new and displaced jobs will vary somewhat from this assumption.
- The casino operates for a full year, starting in 2004. We present information for the full year, even though the first full year may not start until after 2004. In reality, construction would precede operation, and would likely be included during the initial portion of the casino's first year of operation.
- We use multipliers in an appropriate manner. While the appropriate use is much more important than the size of the multiplier used, the size of the multipliers we use (for tourism, purchases, and payroll) are based on economy-wide analysis, using a number of strong assumptions. The actual multiplier effect will be somewhat different.

We make further simplifying assumptions about non-casino expenditures, including:

- Transportation expenses, in particular expenses for gasoline and gasoline taxes, on average pay for the cost of the service, including road maintenance. No additional benefit or displacement effects were included due to these expenditures.
- A good portion of the state gaming tax is used to pay for regulation of the industry.
- As the majority of the casino revenue comes from Michigan residents, the other state and local taxes (such as sales taxes and property taxes) can be ignored in the analysis. In reality, such taxes (especially property taxes that would have been paid by businesses that lost earnings due to substitution of casino visits) are likely to magnify the effect of the displaced income.

- The current use of the land generates no income tax or property tax revenue to the state, and the future use will not either. In reality, the current use generates some taxes, and the intended use would result in a tax-exempt status for much of the casino operations. This again makes the analysis conservative.
- The effect of federal income taxes can be ignored. In reality, federal income taxes would generate "leakages" from the state under both the current use of the land, and in any proposed casino development.

PROJECTED ECONOMIC IMPACT RESULTS

Using these assumptions and methodologies, and with the cautions mentioned above, we estimate the following economic impact for the State of Michigan, and for counties and regions within it. More detail regarding the projected impacts is available in this report's appendix, beginning on page 31.

The impacts discussed below assume competition from existing casinos only. If we assume that new casinos are opened in New Buffalo and Emmett, the gross benefits and losses due to the Wayland facility would be reduced. However, we found that the net effect of the new casino on the State of Michigan remained at a comparable level to the figures presented in the following results.

The following tables show the net economic impact of opening the proposed Wayland casino by region. Table 1 compares the net economic benefit to Allegan County to the net economic loss to the rest of Michigan. Table 2 further breaks down the economic effect by region.

**TABLE 1. Summary of Net Economic Benefit, (\$Millions)
Allegan County compared to rest of Michigan**

Region	2004	2004 to 2014
Allegan County	97.5	1,185.9
Michigan (except Allegan)	(123.5)	(1,503.5)
Michigan Net Benefit (loss)	(26.10)	(317.57)

State of Michigan

The casino enterprise will generate substantial new economic activity in the state, especially in Allegan County. Much of the casino payroll and purchases will be made in Allegan and nearby counties. Profits and management fees, however, will be split between Michigan and non-Michigan residents.

The majority of the casino expenditures will come from gaming losses by residents of the state. These losses ("revenue" to the casino) displace other expendi-

tures in the state, as well as savings of Michigan residents that they would use to make purchases in the future.

Therefore, the gross expenditures arising from the new casino would be \$192.22 million in 2004, provided the casino operated for the complete calendar year. Subtracting the displaced income of Michigan residents, in the amount of \$218.32 million from the gross expenditures, however, results in a net economic benefit of \$-26.1 million in 2004. Between 2004 and 2014, the Michigan economy will lose more than \$315 million as a result of operations at the proposed casino.

This negative net benefit means that, after accounting for all benefits and all costs, the operation of the casino enterprise will result in dollars flowing out of the state.

Effect by Region

Below we discuss the net impact by region.

TABLE 2. Summary of Net Economic Benefit, by Region (\$Millions)

Region	2004	2004 to 2014
Allegan County	97.5	1,185.9
Barry County	(6.0)	(73.6)
Kalamazoo County	(4.4)	(53.7)
Kent County	(49.7)	(605.2)
Ottawa County	(12.3)	(149.2)
Northern Michigan	(15.3)	(185.9)
Middle Michigan	(24.1)	(293.2)
Southeast Michigan	8.1	98.7
Other Southwest Michigan Counties ^a	(19.8)	(241.4)
Michigan Net Benefit (loss)	(26.10)	(317.57)

a. Berrien, Branch, Calhoun, Cass, St. Joseph, and Van Buren Counties.

Kent County

Kent County residents are likely to generate a substantial amount of casino revenue, meaning that Kent will have a significant amount of income displaced from other industries. Given its nearby location and business centers, Kent should also account for some of the payroll and purchases.

Subtracting the displaced income from the additional payroll and purchases generates an estimated economic loss of \$49.7 million in 2004 for Kent County residents for a full year of casino operation. This figure increases to a \$60.6 million loss per year by 2014.

Allegan County

Allegan receives the largest share of the payroll, based on our assumption that a substantial number of casino workers will reside in the county. In addition, payments to the tribe are assumed to be made in Allegan County.¹⁷

Allegan residents are assumed to provide only a small portion of the gaming revenue. Therefore, the net benefit to the county is a fairly substantial \$97.5 million in 2004.

Note that this net economic benefit will be spread very unevenly within the county. Owners of commercial real estate in the areas near the casino, and investors in the casino or royalty-earning members of the tribe, could benefit handsomely. Owners of competing entertainment venues on the Lakeshore, however, could actually lose business.

Kalamazoo County

Kalamazoo county residents will have a pattern similar to that of Kent County, in that they will make up a substantial amount of gaming revenue, and get a smaller share of the benefits.

We estimate a net economic benefit for Kalamazoo county residents of \$-4.4 million in 2004. This figure grows to -\$5.4 in 2014.

Other Areas of Impact

Our model also shows negative economic benefits to Ottawa and Barry Counties. These counties, along with Kent and Kalamazoo, are in immediate proximity with the Wayland township site.

Other areas of the State are also likely to lose economic activity as a result of a Casino development in Wayland Township. In 2004, the Southwest Michigan Counties of Berrien, Branch, Calhoun, Cass, St. Joseph, and Van Buren will see a combined net benefit of \$-19.8 million; the Mid-Michigan Counties of Clinton, Eaton, Genesee, Gratiot, Ingham, Ionia, Livingston, Montcalm, Saginaw, and Shiawassee will lose a combined \$24.1 million; and the Northern-Mid-

17. Note our allocation of profit in-state and out-of-state is about 50-50. This figure is not precise, though, given that tribe members in the state will presumably invest some of the funds out of the state. Similarly, we assume investors in the casino management firms will reside partially out of state, with some in-state partners.

Michigan Counties of Isabella, Lake, Mason, Mecosta, Muskegon, Newaygo, Oceana, and Osceola will lose a combined \$15.3 million.

In addition to Allegan County, our model reveals a positive net economic benefit to only one other area of the State. In 2004 we see a net benefit of \$8.1 million for Southeast Michigan. This results largely because 1) given the distance from the area to the casino, we expect that only 2% of the casino's total revenues will come from residents of Southeast Michigan, and 2) as home to many of the State's businesses, we expect a significant portion of the casino's expenditures, 7%, to be directed to Metro Detroit businesses.

Impact to Michigan Jobs

In addition to measuring the change in total net economic benefit to the State of Michigan and specific regions, we also determined the effect that the proposed casino would have on the State in terms of jobs lost or gained. Table 3 shows the impact of the proposed Wayland Township casino on employment in Michigan.

TABLE 3. Economic Impact to Michigan Jobs^a

Year	Total Jobs Gained ^b	Total Jobs Lost	Net Change in MI Employment
2004	3,173	4,912	(1,738)
2005	2,416	5,010	(2,594)
2006	2,464	5,110	(2,646)
2007	2,513	5,212	(2,699)
2008	2,564	5,316	(2,753)
2009	2,615	5,423	(2,808)
2010	2,667	5,531	(2,864)
2011	2,721	5,642	(2,921)
2012	2,775	5,755	(2,980)
2013	2,830	5,870	(3,039)
2014	2,887	5,987	(3,100)

a. These figures represent a difference in annual jobs. For example, if the casino were opened, we expect there to be 2,864 fewer jobs in the economy by 2010.

b. Total Jobs Gained and Lost include direct, indirect, and tourism induced jobs. Total Jobs Gained in 2004 includes 805 construction jobs, although construction will likely be spread out over multiple years.

Temporary jobs created through the construction of the casino will reduce the initial negative impact of the casino on Michigan employment. During the first year of operation, the casino will result in a net decrease of 1,738 Michigan jobs, because our analysis assumes that construction will occur entirely in 2004, resulting in an additional 805 jobs gained during that year.

When we assume that the casino no longer supports temporary construction jobs, we see the net decrease in Michigan employment increase to a loss of 2,594 jobs in 2005. The net change in Michigan employment increases to 3,100 jobs by 2014.

By comparing these job figures with the regional sources-of-income data in Table 5 on page 18, we can infer that the change in jobs would be greatest in those counties that provide the most revenue. Therefore, it is likely that the majority of the job losses will come from Kent, Ottawa, and other counties in Southwest and Mid-Michigan. A very large majority of job gains will come into Allegan County, although the overall increase will be comprised of large gains around the casino, and smaller losses in the Lakeshore and other areas. Although we can fairly precisely define the county of residence of gaming patrons, we cannot define within similar precision the counties in which they spend their earnings. Therefore, we have not estimated county-by-county job loss figures.

The effect of the casino on tourism related jobs is minimal. We consider tourism related jobs to be those jobs created through the expenditure from out-of-state visitors. Our analysis finds that between 46 jobs in 2004 and 56 jobs in 2014 are created due to tourism from out-of-state visitors. This results in a minor overall effect on the economy.

The results of our analysis show that it takes nearly twice as much expenditure at a casino to support the same number of jobs that average non-casino expenditure supports. This is because a larger portion of the casino expenditure is directed (1) out of state, and (2) to uses that have a lesser spin-off effect on the economy.¹⁸

18. We assumed that the average casino job pays the same as the average non-casino job in terms of wages and benefits, and that the multiplier effects for casino payroll, casino purchases, and displaced income in Michigan were all the same.

Appendix A: Model Inputs and Results

The following appendix contains:

Table A-1: Economic Impact Model Data

Table A-2: Economic Impact to Michigan

Table A-3: Gross Benefits to Other States

Table A-4: Net Benefits by County

Table A-5: Regional and County Shares

Table A-6: Economic Impact to Michigan: Jobs

Table A-7: Gaming Visits and Revenue Sources by County, Scenario 1

Table A-8: Gaming Visits and Revenue Sources by County, Scenario 2

Table A-1. Economic Impact Model Data

Allegan County Casino – Base Case:

<u>Variable Name</u>	<u>Variables</u>	<u>Values</u>
1. Gaming Revenue Sources	<i>Gaming Revenue from residents of:</i>	Smillions
Scenario 1		
out_of_state_rev	Indiana, Ohio, Illinois, and other states	\$ 25.49
allegan_rev	Allegan County	\$ 8.77
kent_rev	Kent County	\$ 44.30
kzoo_rev	Kalamazoo County	\$ 13.57
ottawa_rev	Ottawa County	\$ 12.47
barry_rev	Barry County	\$ 4.98
sw_mich_rev	Southwest Michigan (Berrien, Branch, Calhoun, Cass, St Joseph and Van Buren counties)	\$ 20.81
se_mich_rev	Southeast Michigan (Hillsdale, Jackson, Lenawee and Washtenaw counties)	\$ 3.34
mid_mich_rev	Mid-Michigan (Clinton, Eaton, Genesee, Gratiot, Ingham, Ionia, Livingston, Montcalm, Saginaw and Shiawassee counties)	\$ 17.46
n_mich_rev	Northern Michigan (Isabella, Lake, Mason, Mecosta, Muskegon, Newaygo, Oceana and Osceola counties)	\$ 10.75
<i>Memo: Total Gaming Revenue</i>		<u>\$ 161.94</u>
Scenario 2		
out_of_state_rev_2	Indiana, Ohio, Illinois, and other states	\$ 7.51
allegan_rev_2	Allegan County	\$ 6.17
kent_rev_2	Kent County	\$ 31.75
kzoo_rev_2	Kalamazoo County	\$ 6.46
ottawa_rev_2	Ottawa County	\$ 7.43
barry_rev_2	Barry County	\$ 3.17
sw_mich_rev_2	Southwest Michigan (Berrien, Branch, Calhoun, Cass, St Joseph and Van Buren counties)	\$ 7.99
se_mich_rev_2	Southeast Michigan (Hillsdale, Jackson, Lenawee and Washtenaw counties)	\$ 2.00
mid_mich_rev_2	Mid-Michigan (Clinton, Eaton, Genesee, Gratiot, Ingham, Ionia, Livingston, Montcalm, Saginaw and Shiawassee counties)	\$ 10.86
n_mich_rev_2	Northern Michigan (Isabella, Lake, Mason, Mecosta, Muskegon, Newaygo, Oceana and Osceola counties)	\$ 7.87
<i>Memo: Total Gaming Revenue</i>		<u>\$ 91.21</u>
1.a Units		
millions	Revenue in units of millions US Dollars	\$ 1,000,000
1.b Casino Revenue Displacement		
mi_casino_displacement	Share of revenue displaced from other Michigan casinos.	0.44
mi_casino_displacement2	Casino Displacement, scenario 2	0.54
<i>Note: displaced casino revenue is treated the same as other displaced income in the impact analysis.</i>		
2. Operations, Management, Gaming Tax, Profit		
rev_share_payroll	share of gaming revenue to payroll and employee expenses	0.55
rev_share_purchases	share of gaming revenue to purchases	0.15
mgmt_fee	Management Expenses, as share of gaming revenue	0.11
investor_share	Returns to investors and bondholders, as share of gaming revenue	0.09
gaming_tax_rate	State tax on gaming revenue	0.08
other_gaming_tax_rate	Other taxes as share of gaming revenue	0.02
<i>audit check</i>	<i>sum of shares must equal 100%:</i>	<u>1.00</u>

3. Michigan Shares		
mi_purchase_share	Michigan Purchase Share	0.950
mi_mgmt_fees_share	Michigan Management Fees Share	0.200
use_share_gaming_tax	Gaming Tax Use Share	1.000
mi_profit_share	Michigan Profit Share	0.500

4. Plant and Property Data		
initial_real_property_value	Initial Real Property Value	\$ 1,000,000
change_real_property_value	Change in Real Property Value	\$ 20,000,000
initial_personal_property_value	Initial Personal Property Value	\$ 100,000
change_personal_property_value	Change in Personal Property Value	\$ 10,000,000
real_growth	Annual Growth Rate, Real Property	% 2
personal_growth	Annual Growth Rate, Personal Property	% 1

Note: Proposed facility would be located on tax-exempt trust lands. See also note below on "construction".

5. Construction Payroll		
construction_workers	Number of Construction Workers, full-year FTE	805
avg_annual_const_hours	Average Annual Construction Hours	2,080
avg_const_wage	Initial Average hourly wage	\$ 25.00

Note: No firm facility plans are available. Actual construction payroll could be significantly different.

6. Payroll, Benefits, and other Employment Expenses		
mi_payroll_share	Michigan residents' payroll, as share of casino payroll	0.9
salary_job_direct	Salary and payroll taxes, direct employment, FTE	35,000
wage_growth	Annual increase in wage and benefits costs	0.02
benefit_rate	Benefits and other employment overhead, as share of salary	0.27

Memo:

Indirect and displaced jobs' salaries assumed, on average, the same as "direct" jobs.

7. Impact Multipliers		
payroll_mult	Payroll Multiplier	1.60
local_purch_mult	Local Purchase Multiplier	1.60
tourism_mult	Tourism Multiplier	1.60
fed_tax_wedge	Share of Michigan Earnings Foregone to Federal Taxes	0.15
nonmich_nongame_spendingshare	Non-Gaming Expenditures by Non-Michigan Residents, as share	0.05

8. County-level Net Benefit and Cost Shares		
county_shares_gain	share of increased income to Michigan, for selected counties	See detail on sheet "county shares".
county_shares_displaced_income	share of displaced income to Michigan, for selected counties	
Note: see "county shares" worksheet		

9. Simulation Parameters		
Tstart	Model Start Time (year)	2,004
Tstop	Model Stop Time (year)	2,014
Tstep	Model Increments	1

Table A-2. Economic Impact to Michigan: Income (in millions)

Years	Gross Benefit		Displaced Income		Net Benefit	
2004	\$	192.22	\$	218.32	\$	(26.10)
2005	\$	196.07	\$	222.69	\$	(26.62)
2006	\$	199.99	\$	227.14	\$	(27.15)
2007	\$	203.99	\$	231.68	\$	(27.69)
2008	\$	208.07	\$	236.32	\$	(28.25)
2009	\$	212.23	\$	241.04	\$	(28.81)
2010	\$	216.47	\$	245.86	\$	(29.39)
2011	\$	220.80	\$	250.78	\$	(29.98)
2012	\$	225.22	\$	255.80	\$	(30.58)
2013	\$	229.72	\$	260.91	\$	(31.19)
2014	\$	234.32	\$	266.13	\$	(31.81)
Total 2004 - 2014	\$	2,339.10	\$	2,656.67	\$	(317.57)

Note: "Gross benefit" includes management fees, profits, payroll, purchases, and economic spin-offs in Michigan

Table A-3. Gross Benefits to Other States (in millions)

Years	Gross Benefit, Non-Michigan	Gaming Revenue Non-Michigan
2004	\$ 25.10	\$ 25.49
2005	\$ 25.60	\$ 26.00
2006	\$ 26.11	\$ 26.52
2007	\$ 26.64	\$ 27.05
2008	\$ 27.17	\$ 27.59
2009	\$ 27.71	\$ 28.14
2010	\$ 28.27	\$ 28.71
2011	\$ 28.83	\$ 29.28
2012	\$ 29.41	\$ 29.87
2013	\$ 30.00	\$ 30.46
2014	\$ 30.60	\$ 31.07
Total 2004 - 2014	\$ 305.44	\$ 310.18

Note: "Gross benefit" includes management fees, profits, payroll, and purchases to non-Michigan residents. No spin-off effects have been calculated for out-of-state expenditures.

Table A-4: Net Benefits by County

\$millions

Years	Allegan	Kent	K'zoo	Ottawa	Barry	SW Mich	SE Mich	Mid Mich	N Mich
2004	\$ 97.5	\$ (49.7)	\$ (4.4)	\$ (12.3)	\$ (6.0)	\$ (19.8)	\$ 8.1	\$ (24.1)	\$ (15.3)
2005	\$ 99.4	\$ (50.7)	\$ (4.5)	\$ (12.5)	\$ (6.2)	\$ (20.2)	\$ 8.3	\$ (24.6)	\$ (15.6)
2006	\$ 101.4	\$ (51.7)	\$ (4.6)	\$ (12.8)	\$ (6.3)	\$ (20.6)	\$ 8.4	\$ (25.1)	\$ (15.9)
2007	\$ 103.4	\$ (52.8)	\$ (4.7)	\$ (13.0)	\$ (6.4)	\$ (21.1)	\$ 8.6	\$ (25.6)	\$ (16.2)
2008	\$ 105.5	\$ (53.8)	\$ (4.8)	\$ (13.3)	\$ (6.5)	\$ (21.5)	\$ 8.8	\$ (26.1)	\$ (16.5)
2009	\$ 107.6	\$ (54.9)	\$ (4.9)	\$ (13.5)	\$ (6.7)	\$ (21.9)	\$ 9.0	\$ (26.6)	\$ (16.9)
2010	\$ 109.8	\$ (56.0)	\$ (5.0)	\$ (13.8)	\$ (6.8)	\$ (22.3)	\$ 9.1	\$ (27.1)	\$ (17.2)
2011	\$ 111.9	\$ (57.1)	\$ (5.1)	\$ (14.1)	\$ (6.9)	\$ (22.8)	\$ 9.3	\$ (27.7)	\$ (17.5)
2012	\$ 114.2	\$ (58.3)	\$ (5.2)	\$ (14.4)	\$ (7.1)	\$ (23.2)	\$ 9.5	\$ (28.2)	\$ (17.9)
2013	\$ 116.5	\$ (59.4)	\$ (5.3)	\$ (14.7)	\$ (7.2)	\$ (23.7)	\$ 9.7	\$ (28.8)	\$ (18.3)
2014	\$ 118.8	\$ (60.6)	\$ (5.4)	\$ (14.9)	\$ (7.4)	\$ (24.2)	\$ 9.9	\$ (29.4)	\$ (18.6)
Net Benefit									
2004-14:	\$ 1,185.9	\$ (605.2)	\$ (53.7)	\$ (149.2)	\$ (73.6)	\$ (241.4)	\$ 98.7	\$ (293.2)	\$ (185.9)

net benefits include additional payroll and purchases (with indirect effects); net of additional gaming revenue paid to casino (with indirect displaced income).

Table A-5: Regional and County Shares

Scenario 1	revenue ^a	county_shares_displ aced income (as share of Mi gaming revenue)	county_shares_spending (as share of Michigan spending) ^b
out_of_state_rev	\$ 25.49	n/a	
allegan_rev	\$ 8.77	6%	58%
kent_rev	\$ 44.30	32%	11%
kzoo_rev	\$ 13.57	10%	9%
ottawa_rev	\$ 12.47	9%	4%
barry_rev	\$ 4.98	4%	1%
sw_mich_rev	\$ 20.81	15%	7%
se_mich_rev	\$ 3.34	2%	7%
mid_mich_rev	\$ 17.46	13%	2%
n_mich_rev	\$ 10.75	8%	1%
Memo: Total Gaming Revenue	\$ 161.94	100%	100%
less: Non-Michigan rev	\$ 25.49		
equals: Michigan rev	\$ 136.45		

(a) Southeast Michigan includes purchases in metro Detroit area.

(b) Estimated based on population, industry, and geography

(c) Revenue figures based on market assessment scenario 1

Table A-6. Economic Impact to Michigan: Jobs

Years	Direct Operations		Total (Direct Operations, Indirect, Tourism, and Construction)		Net Change in Michigan Employment (e)
	Jobs Gained	Jobs Lost (c, d)	Jobs Gained (a, b)	Jobs Lost (c, d)	Jobs Gained less Jobs Lost (e)
2004	1,803	3,070	3,173	4,912	(1,738)
2005	1,839	3,131	2,416	5,010	(2,594)
2006	1,876	3,194	2,464	5,110	(2,646)
2007	1,914	3,258	2,513	5,212	(2,699)
2008	1,952	3,323	2,564	5,316	(2,753)
2009	1,991	3,389	2,615	5,423	(2,808)
2010	2,031	3,457	2,667	5,531	(2,864)
2011	2,072	3,526	2,721	5,642	(2,921)
2012	2,113	3,597	2,775	5,755	(2,980)
2013	2,155	3,669	2,830	5,870	(3,039)
2014	2,198	3,742	2,887	5,987	(3,100)

notes

- a Construction assumed to occur entirely in 2004; actual construction will be spread over multiple years.
- b Facility size is unknown, so construction estimate is not precise.
- c Consumer expenditures per job, and average salary and overhead, and income multipliers assumed the same for both new (casino-related) and displaced jobs
- d Direct and indirect jobs include all casino-related employment from payroll and purchases in Michigan.
- e Net change is the difference between total new jobs (direct operation, indirect, tourism and construction) gained, and total jobs lost, for the State of Michigan.

TABLE A-7: Gaming Visits and Revenue Sources by County, Competitive Scenario One
Competitive Market Made Up of Current Casinos Only

County	Gamblers 21+ years	Current Casinos (No Wayland, New Buffalo, or Emmett)		Annual Total Casino Visits	Current Casinos plus Wayland Annual Total Casino Revenue	Annual Wayland Visits	Annual Wayland Revenue
		Annual Total Casino Visits	Annual Total Casino Revenue				
Totals	1,120,090	4,620,843	\$ 262,985,005	6,594,170	\$ 355,148,957	3,190,658	\$ 161,930,074
LaPorte, IN*	21,247	209,579	\$ 8,426,448	209,579	\$ 8,706,697	11,841	\$ 789,732
St. Joseph, IN	76,656	459,966	\$ 22,998,600	459,966	\$ 25,516,937	167,888	\$ 10,912,840
Elkhart, IN	53,700	316,058	\$ 15,894,706	316,058	\$ 17,691,569	116,192	\$ 7,552,198
Steuben, IN	10,025	30,069	\$ 1,954,368	30,069	\$ 1,954,368	15,031	\$ 977,184
Lafayette, IN	9,367	28,886	\$ 1,657,792	28,886	\$ 1,867,334	14,757	\$ 926,606
De Kalb, IN*	8,406	25,222	\$ 1,639,482	25,222	\$ 1,639,482	12,613	\$ 819,741
Noble, IN*	12,675	38,027	\$ 2,471,898	38,027	\$ 2,471,898	19,016	\$ 1,255,548
Marshall, IN*	3,400	20,396	\$ 1,019,760	20,396	\$ 1,131,423	7,443	\$ 483,876
Kosciusko, IN	16,571	57,298	\$ 3,497,015	57,298	\$ 3,580,047	28,663	\$ 1,728,472
Mason, MI*	658	3,950	\$ 197,520	3,950	\$ 219,148	1,442	\$ 93,723
Lake, MI*	3,024	17,125	\$ 1,024,472	17,125	\$ 1,039,921	4,009	\$ 195,647
Osceola, MI*	4,909	29,457	\$ 1,733,217	29,457	\$ 1,763,932	5,037	\$ 327,372
Ucarua, MI	7,658	37,726	\$ 2,140,928	37,726	\$ 2,235,220	11,449	\$ 744,088
Newaygo, MI	14,090	48,109	\$ 3,030,095	67,854	\$ 4,033,364	27,220	\$ 1,458,547
Macosta, MI*	11,416	88,492	\$ 5,369,461	88,492	\$ 4,050,276	15,132	\$ 958,822
Isabella, MI*	13,341	128,049	\$ 5,248,622	128,049	\$ 5,425,103	8,279	\$ 538,229
Saginaw, MI*	7,123	6,737	\$ 400,891	6,737	\$ 497,263	1,174	\$ 76,292
Muskegon, MI	48,254	144,760	\$ 9,409,686	264,896	\$ 15,479,300	125,712	\$ 6,432,245
Montcalm, MI	17,732	104,740	\$ 5,217,547	106,402	\$ 5,667,453	45,242	\$ 2,557,425
Gratiot, MI*	11,022	88,405	\$ 3,876,798	88,405	\$ 4,119,190	14,458	\$ 939,835
Kent, MI	164,429	495,239	\$ 32,132,094	1,265,059	\$ 60,339,065	1,017,839	\$ 41,298,352
Genesee, MI*	6,204	35,208	\$ 1,870,697	35,208	\$ 1,928,570	5,002	\$ 325,062
Ottawa, MI	68,712	204,141	\$ 13,268,970	412,282	\$ 23,657,743	249,583	\$ 12,469,084
Shiawassee, MI*	19,331	64,026	\$ 4,078,869	64,026	\$ 4,092,248	12,414	\$ 806,763
Ionia, MI	16,908	53,068	\$ 3,379,230	101,456	\$ 5,693,708	58,224	\$ 2,922,894
Clinton, MI	18,652	90,387	\$ 5,496,245	96,331	\$ 5,894,633	18,720	\$ 1,162,625
Livingston, MI*	39,553	237,323	\$ 12,427,698	237,323	\$ 12,844,168	32,978	\$ 2,143,419
Ingham, MI	75,355	233,520	\$ 15,036,519	285,983	\$ 17,991,918	67,341	\$ 3,899,687
Bay, MI	16,655	32,657	\$ 2,122,770	129,525	\$ 5,897,438	110,813	\$ 4,978,145
Eaton, MI	30,242	90,714	\$ 5,896,566	174,486	\$ 10,579,796	52,168	\$ 2,629,367
Allegan, MI	20,960	66,351	\$ 5,619,042	244,452	\$ 11,261,782	206,122	\$ 8,770,557
Washtenaw, MI*	6,465	38,791	\$ 1,951,699	38,791	\$ 2,041,896	6,125	\$ 398,143
Jackson, MI	46,189	173,150	\$ 10,320,992	179,150	\$ 10,459,215	32,711	\$ 2,126,316
Calhoun, MI	38,791	113,432	\$ 7,372,950	221,130	\$ 13,105,802	87,080	\$ 4,392,697
Kalamazoo, MI	68,422	205,280	\$ 13,342,836	421,882	\$ 23,000,920	276,819	\$ 13,571,973
Van Buren, MI	21,413	92,548	\$ 5,166,612	128,491	\$ 6,818,274	73,953	\$ 3,697,595
Berrien, MI	45,789	287,744	\$ 14,059,280	287,744	\$ 15,293,070	99,659	\$ 5,202,434
Lenawee, MI*	2,846	9,429	\$ 586,254	9,429	\$ 590,555	2,198	\$ 142,913
Hillsdale, MI*	12,224	35,974	\$ 2,338,284	36,677	\$ 2,383,992	10,326	\$ 670,865
Branch, MI	13,431	39,364	\$ 2,559,024	44,991	\$ 2,835,040	23,495	\$ 1,437,378
Cass, MI	14,677	63,229	\$ 4,233,756	88,095	\$ 4,721,745	38,764	\$ 2,204,502
St. Joseph, MI	17,533	53,452	\$ 3,448,836	90,440	\$ 5,148,360	55,205	\$ 2,870,995
Williams, OH*	855	2,565	\$ 166,764	2,565	\$ 166,764	1,283	\$ 83,382

* Denotes that a portion of county is not included in the Wayland Township market area and is therefore not included in the county results depicted here.
Source: Anderson Economic Group market assessment

TABLE A-8: Gaming Visits and Revenue Sources by County, Competitive Scenario Two
Competitive Market Made Up of Current Casinos Plus the New Buffalo and Emmett Casinos

County	Gamblers 21+ years	Current and Proposed Casinos (No Wayland)		Current and Proposed Casinos plus Wayland		Annual Wayland Visits	Annual Wayland Revenue
		Annual Total Casino Visits	Annual Total Casino Revenue	Annual Total Casino Visits	Annual Total Casino Revenue		
Totals	1,120,090	6,365,803	\$ 351,250,908	7,316,026	\$ 392,778,195	1,879,971	\$ 91,207,822
La Porte, IN*	21,247	209,579	\$ 8,572,501	209,579	\$ 8,706,897	1,934	\$ 125,728
St. Joseph, IN	76,656	463,528	\$ 24,636,114	463,528	\$ 25,610,442	41,590	\$ 2,703,262
Elkhart, IN	53,200	317,117	\$ 16,904,952	317,117	\$ 17,573,462	20,504	\$ 1,317,621
Steuken, IN	10,025	60,137	\$ 3,489,119	60,137	\$ 3,577,649	6,346	\$ 412,339
Lafayette, IN	9,367	55,211	\$ 3,272,855	55,211	\$ 3,311,574	5,815	\$ 377,401
De Kalb, IN*	8,406	26,173	\$ 1,687,994	26,173	\$ 1,690,793	6,271	\$ 407,466
Mobile, IN*	12,675	38,887	\$ 2,520,500	38,887	\$ 2,523,777	8,973	\$ 615,847
Marshall, IN*	3,400	20,396	\$ 1,088,056	20,396	\$ 1,131,423	1,863	\$ 120,969
Kosciusko, IN*	16,571	57,298	\$ 3,553,614	57,298	\$ 3,593,648	13,386	\$ 877,766
Mason, MI*	658	3,950	\$ 197,520	3,950	\$ 219,148	721	\$ 46,862
Lake, MI*	3,024	17,125	\$ 1,024,472	17,125	\$ 1,039,921	1,008	\$ 64,463
Osceola, MI*	4,909	29,457	\$ 1,733,217	29,457	\$ 1,763,932	2,518	\$ 163,689
Oscoda, MI	7,858	37,726	\$ 2,140,925	37,726	\$ 2,235,220	7,294	\$ 474,008
Newaygo, MI	14,090	48,109	\$ 3,045,511	67,854	\$ 4,104,371	22,231	\$ 1,198,865
Mecosta, MI	11,416	68,492	\$ 3,994,432	68,492	\$ 4,068,652	7,875	\$ 500,488
Isabella, MI*	13,341	128,049	\$ 5,277,847	128,049	\$ 5,441,915	2,746	\$ 178,483
Saginaw, MI*	1,423	6,737	\$ 407,283	6,737	\$ 411,809	590	\$ 34,487
Muskegon, MI	48,254	144,760	\$ 9,409,686	264,896	\$ 15,847,560	101,161	\$ 5,204,711
Montcalm, MI	17,732	104,740	\$ 5,852,223	106,402	\$ 5,968,495	27,332	\$ 1,464,832
Gratiot, MI*	11,022	88,405	\$ 4,119,190	88,405	\$ 4,262,867	5,087	\$ 330,632
Kenosha, MI*	164,428	797,106	\$ 47,372,365	1,265,059	\$ 63,037,224	736,683	\$ 4,753,949
Genesee, MI*	6,204	35,208	\$ 1,928,570	35,208	\$ 1,972,368	2,354	\$ 153,086
Ottawa, MI	68,712	206,145	\$ 13,399,230	412,282	\$ 24,570,744	148,517	\$ 7,425,818
Shiawassee, MI*	19,331	70,368	\$ 4,446,810	70,368	\$ 4,464,990	9,409	\$ 611,538
Ionia, MI	16,908	93,333	\$ 5,329,621	101,456	\$ 5,562,547	37,460	\$ 1,877,451
Clinton, MI	18,652	111,932	\$ 6,572,661	111,932	\$ 6,633,525	9,784	\$ 594,307
Livingston, MI*	39,553	237,323	\$ 12,828,307	237,323	\$ 13,144,210	13,440	\$ 838,564
Ingham, MI	75,355	452,107	\$ 27,237,091	452,107	\$ 27,225,748	49,964	\$ 2,881,562
Bay, MI*	16,655	108,536	\$ 5,761,290	138,142	\$ 8,410,288	74,589	\$ 3,170,902
Eaton, MI	30,242	188,951	\$ 11,119,964	188,951	\$ 10,767,567	39,311	\$ 1,980,841
Allegan, MI	29,960	158,727	\$ 9,315,067	244,452	\$ 11,817,499	147,352	\$ 6,174,756
Washtenaw, MI*	6,465	38,791	\$ 1,964,818	38,791	\$ 2,034,889	2,444	\$ 158,845
Jackson, MI	46,189	277,171	\$ 16,047,322	277,171	\$ 16,318,838	20,384	\$ 1,324,038
Calhoun, MI	38,791	380,358	\$ 17,030,620	380,358	\$ 17,400,585	37,055	\$ 1,870,294
Kalamazoo, MI	69,422	472,728	\$ 24,980,708	484,064	\$ 24,694,373	133,314	\$ 6,356,927
Van Buren, MI	21,413	128,491	\$ 6,728,929	128,491	\$ 6,639,699	34,772	\$ 1,738,719
Berrien, MI	45,769	308,386	\$ 15,363,491	308,386	\$ 15,625,755	27,078	\$ 1,622,464
Lenawee, MI*	2,846	17,078	\$ 999,137	17,078	\$ 1,017,170	1,445	\$ 93,888
Hillsdale, MI*	12,224	73,352	\$ 4,254,670	73,352	\$ 4,428,770	6,499	\$ 422,455
Branch, MI	13,431	84,151	\$ 4,750,070	84,151	\$ 4,854,988	9,682	\$ 595,083
Cass, MI	14,677	88,055	\$ 4,572,760	88,055	\$ 4,669,242	13,590	\$ 890,337
St. Joseph, MI	17,533	105,199	\$ 6,020,593	105,199	\$ 5,899,624	26,468	\$ 1,369,951
Williams, OH*	655	5,131	\$ 287,723	5,131	\$ 305,277	734	\$ 47,524

* Denotes that a portion of county is not included in the Wayland Township market area and is therefore not included in the county results depicted here.
Source: Anderson Economic Group market assessment

Appendix B: Figures

This appendix includes:

Figure 1: Gaming Revenue Sources, 2004

Figure 2: State vs. Out-of-State Revenue, 2004

Figure 3: Gross Expenditures in Michigan Economy, 2004-2014

Figure 4: Net Benefit to Michigan Economy, 2004-2014

Figure 5: Net Benefit by County of Region, 2004

Figure 1. Gaming Revenue Sources, 2004

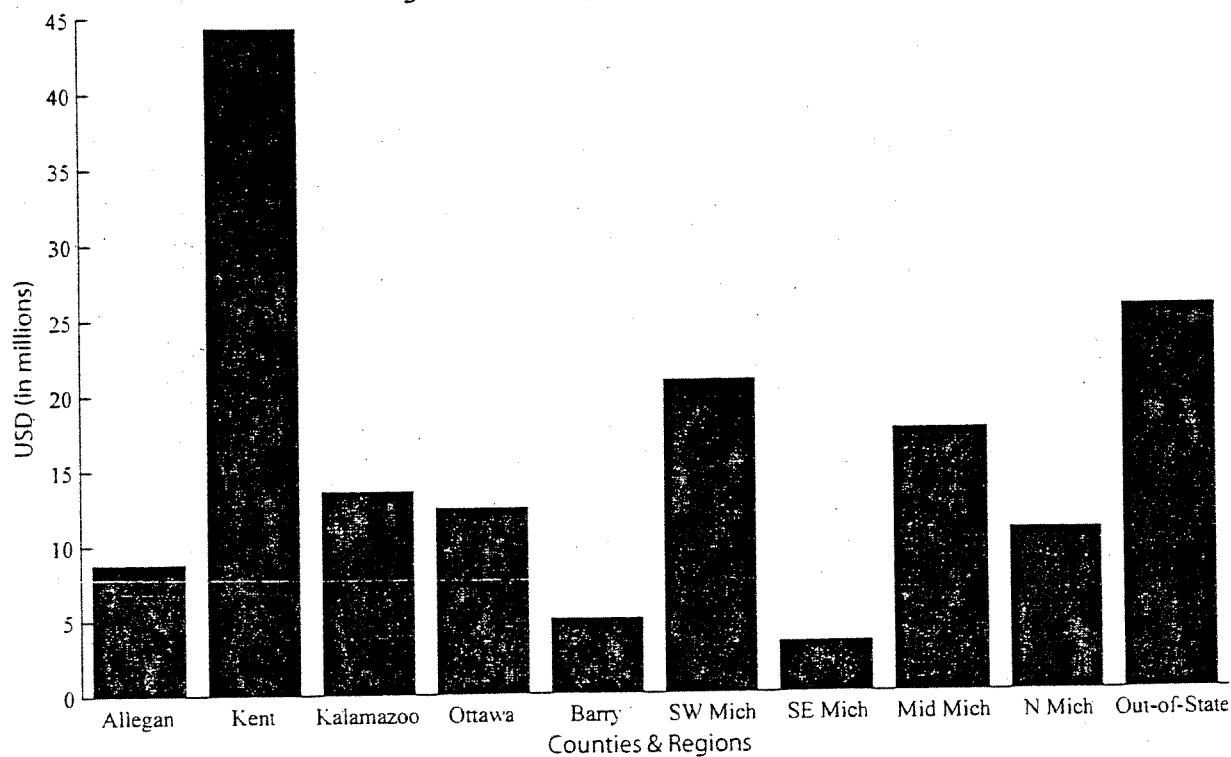
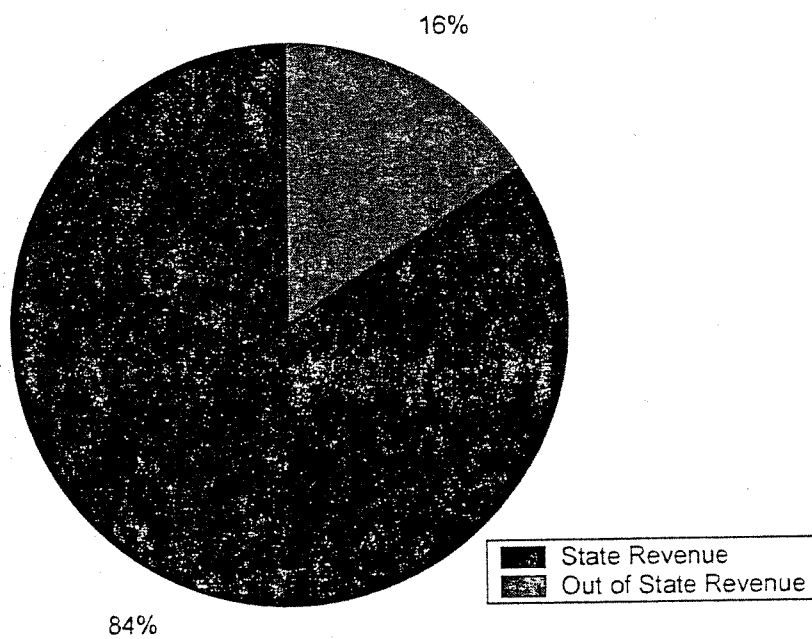


Figure 2. State vs. Out-of-State Revenue, 2004



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Figure 3. Gross Expenditures in Michigan Economy, 2004-2014

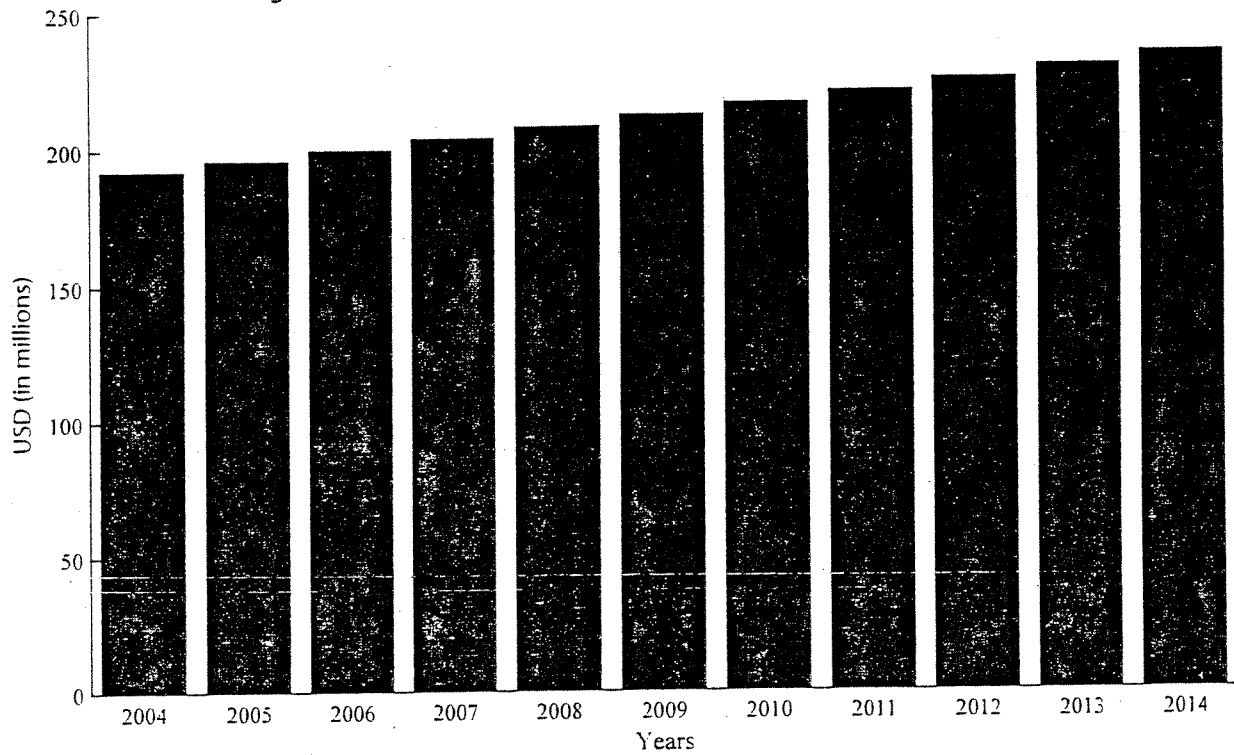
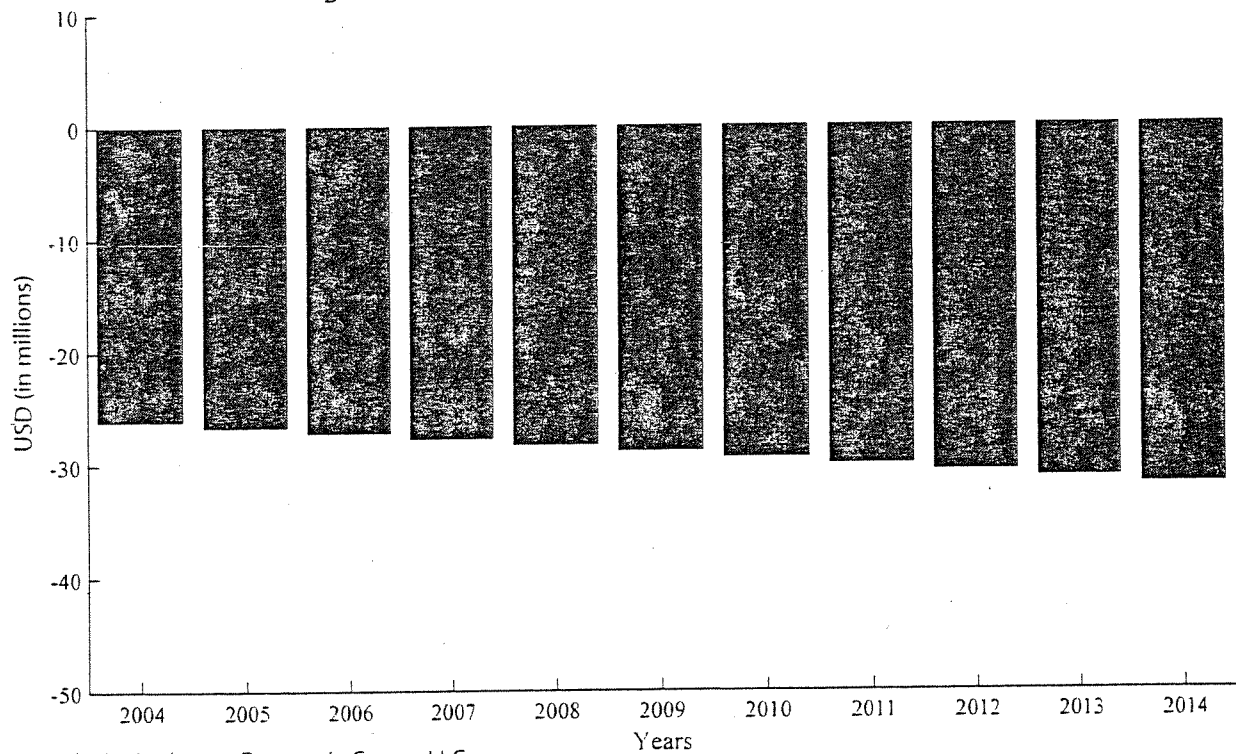


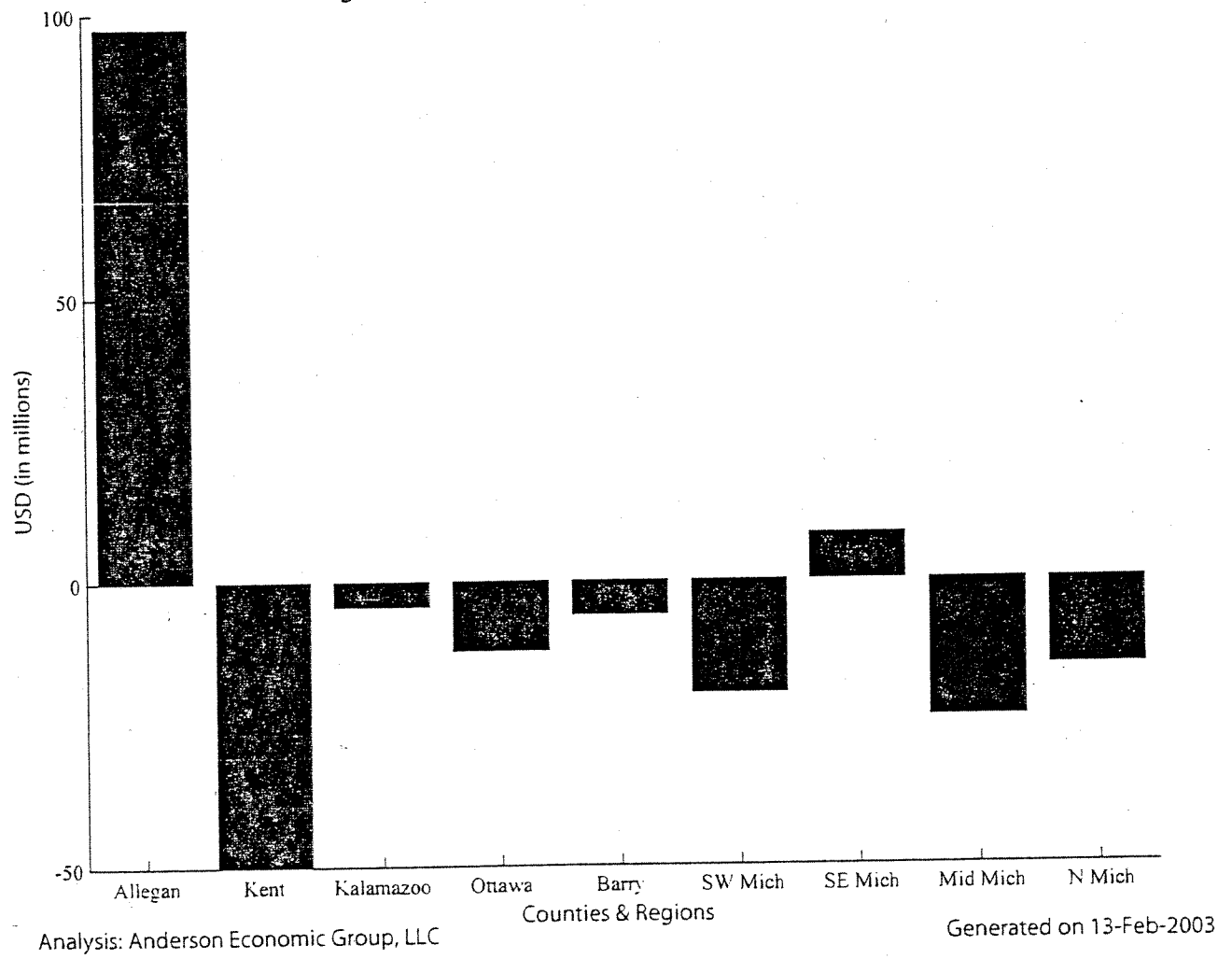
Figure 4. Net Benefit to Michigan Economy, 2004-2014



Analysis: Anderson Economic Group, LLC
Data: Anderson Economic Group, LLC

Generated on 13-Feb-2003

Figure 5. Net Benefit by County or Region, 2004

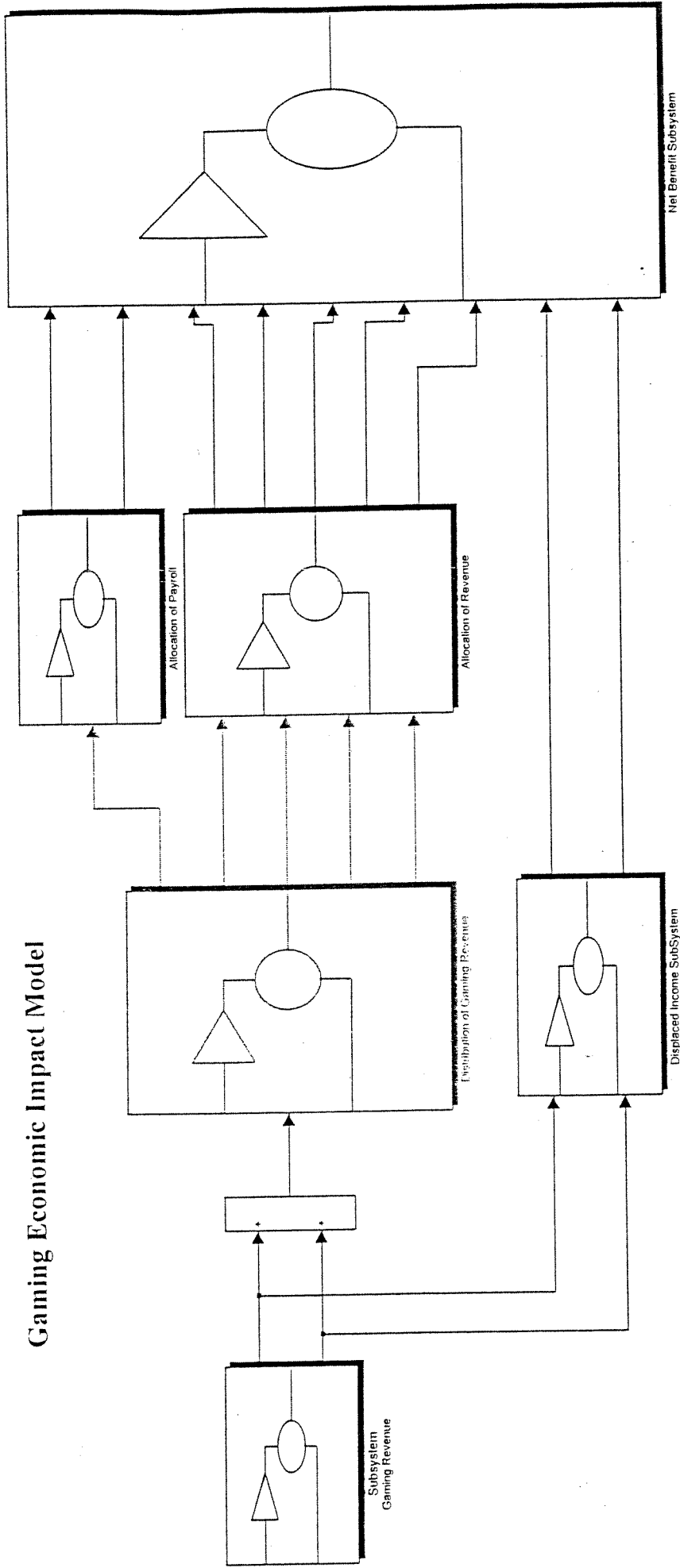


Appendix C: Model Schematic

Appendix C includes:

Simulink Model Schematic

Gaming Economic Impact Model



Local Economic Impact Model
Version 2.318, Modified 12-Feb-2003 17:38:01
Gaming Economic Impact Model
The Revenue Module calculates the net gaming revenue from residents of different areas.
The Distribution module allocates the gaming revenue into the components of business expenses, management fees, taxes, and returns to investors.
The Payroll module further refines the estimates of payroll expenses.
The Displacement subsystem models displacement effects and multiplier effects.
-Patrick L. Anderson-

About Anderson Economic Group

FIRM PROFILE

Anderson Economic Group, L.L.C. specializes in providing consulting services in economics, finance, public policy, and geographic market assessments. Our approach to work in these fields is based on our core principles of professionalism, integrity, and expertise.

We insist on a high level of integrity in our analyses, together with technical expertise in the field. For these reasons, work by Anderson Economic Group is commonly used in legislative hearings, legal proceedings, and executive strategy discussions.

Since our founding in 1996, our analysis has helped publicly-held corporations, private businesses, governments, and non-profit organizations. Our work has included markets throughout the United States, as well as in Canada, Mexico, and Barbados. Recent Anderson Economic Group clients include:

Governments

- State of Michigan
- State of Wisconsin
- State of North Carolina
- City of Detroit, Michigan
- Oakland County, Michigan
- Van Buren, Ionia, Barry, and Berrien Counties, Michigan
- Detroit-Wayne County Port Authority
- City of Norfolk, Virginia
- City of Fort Wayne, Indiana
- City of Big Rapids, Michigan

Businesses

- General Motors Corporation
- PG&E Generating
- Becks, North America
- SBC and SBC Ameritech
- The Detroit Lions
- Labatt USA
- Honda, Toyota, Mercedes-Benz, Lincoln-Mercury, and Ford dealerships or their associations

Nonprofit and Trade Organizations

- International Mass Retailers Association
- Hudson Institute
- Michigan Retailers Association
- Michigan Chamber of Commerce
- Telecommunications Association of Michigan
- Automation Alley
- American Automobile Manufacturers Association

Anderson Economic Group follows a quality assurance program based on the elements of ISO 9000. Among the quality assurance steps we insist upon are the use of a written methodology; documentation of important sources; file organization and retention schedules; proper summarization of technical work for use in public hearings or executive discussions; and high quality standards for written reports and graphics.

Our firm's web site, <http://AndersonEconomicGroup.com>, provides additional information about AEG, its services, and past projects.

PROJECT TEAM

This project team was led by Patrick L. Anderson, Principal, Anderson Economic Group. He has nearly twenty years of professional economics experience, including serving as the deputy budget director for the State of Michigan, chief of staff for the Michigan Department of State, and as an economist for two of Michigan's largest financial institutions, as well as a graduate fellow in the Central Intelligence Agency. He is the author of over 85 published monographs and articles, which have appeared in *The Wall Street Journal*, *Detroit News*, *Detroit Free Press*, *Crain's Detroit Business*, *Michigan Forward*, *American Outlook* and other publications.

Christopher Cotton and Scott Watkins served as coauthors of the report. Mr. Cotton, Consultant, has a background in economic development, market assessments, and Geographic Information Systems (GIS) analysis. He serves as AEG's lead market consultant, and has led the expansion of the firm's market assessment services. Mr. Watkins, Consultant and Director of Marketing and Administration at AEG, has a public policy and marketing background. He has experience on AEG projects involving economic development and market assessments.

Also contributing to the research and analytical portions of the project was Ilhan K. Geckil, Economist. Mr. Geckil assisted in the design of the economic impact model.

TAB F



NATIONAL GAMBLING IMPACT STUDY COMMISSION

800 North Capitol Street, N.W., Suite 450, Washington, D.C. 20002

Tel: 202-523-8217; Fax: 202-523-4394

June 18, 1999

TO THE PRESIDENT, CONGRESS, GOVERNORS, AND TRIBAL LEADERS:

At the inaugural meeting of this Commission two years ago, I stated that we had been charged by Congress with "a very broad and very difficult task -- to conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States." We have now completed that task. This Report presents the principal findings of that effort and the recommendations we believe provide a coherent framework for action.

The Commission devoted considerable attention and resources to discharging its responsibilities, efforts which included holding a series of hearings around the country in which the Commission and its Subcommittees received testimony from hundreds of experts and members of the public; making several site visits; commissioning original research; conducting surveys of the existing, wide-ranging literature; and soliciting and receiving input from a broad array of individuals and organizations.

Despite these extensive efforts, we have not exhausted the topic: the subject of gambling's impact is too extensive to be fully captured in a single volume. Through our contracted research, we have added important new information in several fields; but the need for additional research remains. In fact, one of our most important conclusions is that far more data is needed in virtually every area. But even though the need for additional information cannot be contested, this cannot be allowed to become an excuse for inaction. It is likely that necessary information will always be in short supply and insufficient to compel agreement on controversial issues or to lay out a road map for the future. However, it is our belief that we have substantially reduced the uncertainties that are an inevitable part of that process.

Two years ago, I also stated that this Commission had a diverse make-up, representing broad differences of opinion, and that I expected that diversity to be fully and forcefully voiced. I believe anyone who has been present at any of our proceedings will acknowledge that that was an accurate forecast. That diversity did not necessarily make for quick decisions or easy consensus, but it did ensure a healthy representation of a wide range of interests and perspectives. One need not claim perfection for the process to understand that this approach is the foundation of representative democracy.

In the end, however, the unanimous adoption of this Report speaks for itself. That is not to say that every Commissioner has agreed with every point or recommendation. Even in areas of agreement, each Commissioner brought to our work his own point of view, some of which is reflected in the individual statements appended to this Report. But the determination of the Commissioners to search for common ground without sacrificing a vigorous advocacy of their perspective is a testament to their dedication to public service.

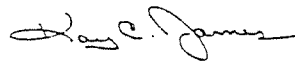
This is the Report of a national Commission to the President, Congress, State Governors, and Tribal Leaders. But although the growth of gambling is a national phenomenon, gambling itself is of greatest concern to the individual communities in which it operates or is proposed to operate. It is at that level that its impact is felt most keenly and where the debates surrounding this issue are most energetically contested. Those communities form no common front: one community may welcome gambling as an economic salvation, while its neighbor may regard it as anathema. As such, there are few areas in which a single national, one-size-fits-all approach can be recommended.

Thus, with only a few exceptions in areas such as the Internet, we agree that gambling is not a subject to be settled at the national level, but is more appropriately addressed at the state, tribal, and local levels. It is our hope that this Report will help spark a review and assessment of gambling in those same communities and jurisdictions. For that reason, we have recommended a pause in the expansion of gambling in order to allow time for an assessment of the costs and benefits already visible, as well as those which remain to be identified. The only certainty regarding these reviews is that any results will be as individual as the communities undertaking them: some will decide to curtail the gambling they already have, others may wish to remove existing restraints. Still others may conclude that their situation requires no change. What is most important, however, is that these reviews take place and that whatever decisions are made are informed ones.

The recommendations in this Report are not self-enacting. In the end, the usefulness of the Commission's work can only be measured by the actions of others, be they in government or in the private sector. Regardless of whether or not their actions draw directly upon the recommendations in this Report or are the result of other efforts that this Commission may help prompt, it is our hope that those who bear the responsibility for protecting and promoting the public's welfare will find this Report useful toward that end. That alone would be sufficient reward for our efforts.

I want to express my deep appreciation to the members of this Commission for their perspective, sacrifice, and commitment to a fair, balanced, and objective analysis of the issue. Our ability to come together with a unanimous Report is indicative of their diligence, as well as the outstanding support provided by the Commission's staff.

On behalf of my fellow Commissioners, thank you for the opportunity to serve the American people.



Kay C. James
Chairman



ACKNOWLEDGMENTS

COMMISSIONERS

Kay C. James, Chairman

William A. Bible
Dr. James C. Dobson
J. Terrence Lanni
Richard C. Leone

Robert W. Loescher
Leo T. McCarthy
Dr. Paul H. Moore
John W. Wilhelm

The Commission recognizes and appreciates the efforts made in the last two years by those who have served the public and the Commission as staff. Through their support and hard work, Commissioners were able to fulfill the mandate set forth by the United States Congress.

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Doug Seay, Deputy Executive Director

Mark Bogdan
Deborah DuCree
Dawn Hively
Janel Newkirk

Valerie Rice
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CHAPTER 1. OVERVIEW

Today the vast majority of Americans either gamble recreationally and experience no measurable side effects related to their gambling, or they choose not to gamble at all. Regrettably, some of them gamble in ways that harm themselves, their families, and their communities. This Commission's research suggests that 86 percent of Americans report having gambled at least once during their lives. Sixty-eight percent of Americans report having gambled at least once in the past year.¹ In 1998, people gambling in this country lost \$50 billion in legal wagering, a figure that has increased every year for over two decades, and often at double-digit rates. And there is no end in sight: Every prediction that the gambling market was becoming saturated has proven to be premature.

THE EXPANSION OF LEGALIZED GAMBLING

The most salient fact about gambling in America—and the impetus for the creation of the National Gambling Impact Study Commission (NGISC)—is that over the past 25 years, the United States has been transformed from a nation in which legalized gambling was a limited and a relatively rare phenomenon into one in which such activity is common and growing. (See Figure 1-1.) Today, all but two states have some form of legalized gambling.² Pari-mutuel racetracks and betting are the most widespread form and are now legal in over 40 states; lotteries have been established in 37 states and the District of Columbia, with more states poised to follow; Indian casinos operate in every region of the country. Non-Indian casino gambling has expanded from Nevada and Atlantic City to the Mississippi Gulf Coast, Midwest riverboats, and

western mining towns. As gambling sites proliferate on the Internet and telephone gambling is legalized in more states, an increasingly large fraction of the public can place a bet without ever leaving home at all. Universally available, "round-the-clock" gambling may soon be a reality.

Once exotic, gambling has quickly taken its place in mainstream culture: Televised megabucks drawings; senior citizens' day-trips to nearby casinos; and the transformation of Las Vegas into family friendly theme resorts, in which gambling is but one of a menu of attractions, have become familiar backdrops to daily life.

IMPACT AND CONTROVERSY

This massive and rapid transformation clearly has had significant economic and social impacts on individuals, communities, and on the United States as a whole. But what are they? And is the net impact positive or negative?

Not surprisingly, the spread of legalized gambling has spawned a range of public debates, infused with the drama of contests between great interests and sharpened by a visceral emotional intensity. Typically, proponents of gambling choose to stress the potential economic benefits that the gambling industry can produce, such as jobs, investment, economic development, and enhanced tax revenues; whereas opponents underline the possible social costs, such as pathological gambling, crime, and other maladies.

Many of the positive economic impacts are in fact easy to point to if not always to quantify: Sleepy backwaters have become metropolises almost overnight; skyscrapers rise on the beaches at once-fading tourist areas; legions of employees testify to the hope and opportunities that the casinos have brought them and their families; some Indian nations have leapt from prolonged neglect and deprivation to sudden abundance. Gambling has not just made the desert bloom in Las Vegas but has made it the fastest growing city in the United States.

¹ National Opinion Research Center, Gambling Impact and Behavior Study, Report to the National Gambling Impact Study Commission, April 1, 1999, p. 6.

² Hawaii and Utah have no legal gambling; pari-mutuel horse racing is legal in Tennessee, but no racetracks are currently operating there.

Others, however, tell a different tale—of lives and families devastated by problem gambling, of walled-off oases of prosperity surrounded by blighted communities, of a massive transfer of money from the poor to the well-off, of a Puritan work ethic giving way to a pursuit of easy money.

Which of these images is true? If elements of both exist, how does one weigh them? Assuming an assessment is even possible, what should be done?

These are obvious questions, but few answers suggest themselves as readily, at least not to all observers. Certainties may abound for the respective partisans; but the ongoing public debate is evidence that these viewpoints have not yet settled the matter. It was for this reason that the NGISC was created and given a mandate to investigate and report on the impact of gambling in America. The task set by Congress—one which the Commissioners confirmed in their own deliberations—was not to shoulder the impossible burden of resolving all disputes, but instead to provide far greater clarity regarding what is really happening in our country, in service of the informed public debate that is a prerequisite for decisionmaking in a democratic society.

4 Moving Target

Gambling is an ephemeral subject, the study of it is frustrated by the apparently solid repeatedly slipping away. A good starting point is a recognition that the gambling “industry” is far from monolithic. Instead, it is composed of relatively discrete segments: Casinos (commercial and tribal), state-run lotteries, pari-mutuel wagering, sports wagering, charitable gambling, Internet gambling, stand-alone electronic gambling devices (EGD’s) (such as video poker and video keno), and so forth. Each form of gambling can, in turn, be divided or aggregated into a variety of other groupings. For example, pari-mutuel wagering includes the

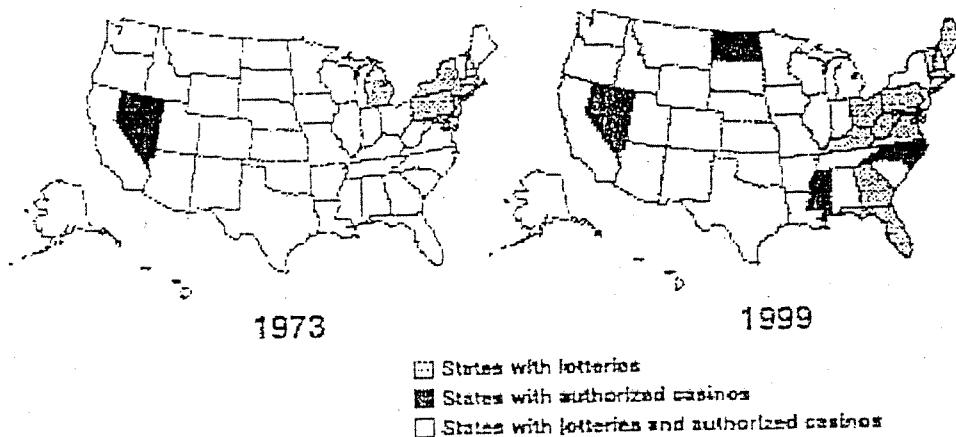
subgroups of horse racing, dog racing, and jai alai. In addition, the terms “convenience gambling” and “retail gambling” have often been used to describe stand-alone slot machines, video keno, video poker, and other EGD’s that have proliferated in bars, truck stops, convenience stores, and a variety of other locations across several states. This term may also be applied to many lottery games. (These groupings will be discussed in greater detail later in this report.)

Each group has its own distinct set of issues, communities of interests, and balance sheets of assets and liabilities. For example, lotteries capture enormous revenues for state governments, ostensibly benefiting the general public in the form of enhanced services, such as education. But critics charge that the states knowingly target their poorest citizens, employing aggressive and misleading advertising to induce these individuals to gamble away their limited means. Casinos spark different discussions. In Atlantic City, the casinos have transformed the Boardwalk and provide employment for thousands of workers. But opponents point to the unredeemed blight only blocks away, made worse by elevated levels of crime that some attribute to the presence of gambling. And so-called convenience gambling may help marginal businesses survive, but at the cost of bringing a poorly regulated form of gambling into the hearts of communities. The Internet brings its own assortment of imponderable issues.

The fortunes of each segment also differ greatly. As a group, the destination casinos have done well. Las Vegas, like America, constantly reinvents itself, with an endless line of new projects. Indian gambling has expanded rapidly, but with enormous disparities in results. Pari-mutuel racetracks have kept their heads above water in the face of increasing competition for gambling dollars, but often only at the price of mutating into quasi-casinos. Lottery revenues have plateaued, prompting some to expand their inventory to include ever-more controversial sources of income, such as video keno.

Figure 1-1

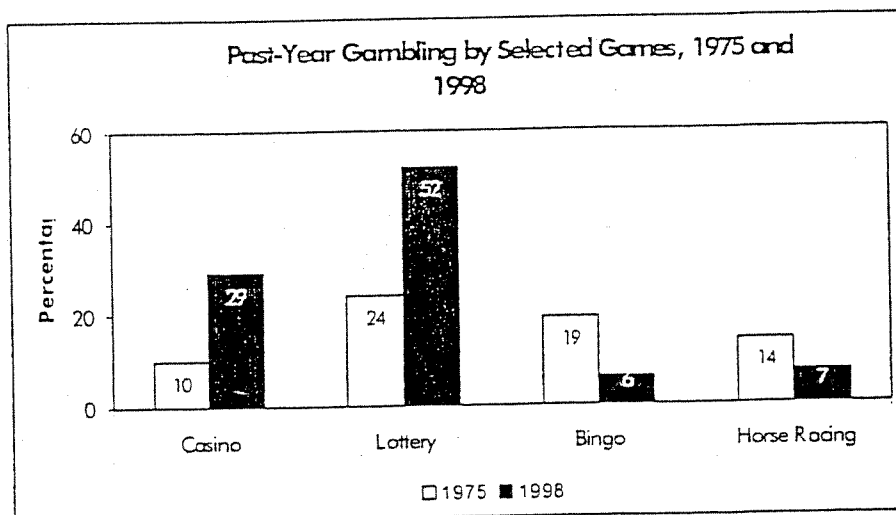
Increase in states with lottery and casino gambling
1973 versus 1999*



*Excludes pari-mutuel gambling

SOURCES: Gross Annual Wager, International Gambling and Wagering Business Magazine, August 1994, p. 2; Gambling in America, Final Report to Congress, 1975, pp. 78, 144; Casino Business Directory, Reed, Nevada; Nevada's Gaming Publishing, 1993 and other sources.

Figure 1-2



SOURCE: National Opinion Research Center at the University of Chicago, Gemini Research, and The Lewin Group. Gambling Impact and Behavior Study. Report to the National Gambling Impact Study Commission. April 1, 1999, p. 7.

The terrain also is becoming more complicated. As gambling has expanded, it has continued to evolve. Technology and competitive pressures have joined to produce new forms, with the onset of the Internet promising to redefine the entire industry.

The participants in the various debates are similarly varied. Even the designations "proponents" and "opponents" must be applied with care because opponents can include those opposed to all gambling, those content with the current extent of gambling but opposed to its expansion, those favoring one type of gambling but opposed to another, and those who simply want to keep gambling out of their particular community, the latter being less motivated by questions of probity than of zoning. Proponents can be similarly divided: Few people in the casino industry welcome the advent of gambling on the Internet, and the owners of racetracks are no friends of the state lotteries. Similarly, if polls are to be believed, a clear majority of Americans favor the continued legalization of gambling (in fact, in any given year a majority of Americans report having gambled; see Figure 1-2) but a clear majority also opposes unlimited gambling, preferring continued regulation. Drawing the line on gambling has proven difficult; and, in fact, most lines in this area become blurred when examined closely. But governments are in business to draw lines, and draw them they do.

THE ROLE OF GOVERNMENT

The public has voted either by a statewide referendum and/or local option election for the establishment or continued operation of commercial casino gambling in 9 of 11 states where commercial casinos are permitted. Similarly, the public has approved state lotteries via the ballot box in 27 of 38 instances where lotteries have been enacted. Whatever the case, whether gambling is introduced by popular referendum or by the decision of elected officials, we must recognize the important role played by government in the industry's growth and development. Government decisions have influenced the expansion of gambling in

America, and influencing those decisions is the principal objective of most of the public debates on this issue.

Although some would argue that gambling is a business like any other and, consequently, should be treated as such, in fact it is almost universally regarded as something different, requiring special rules and treatment, and enhanced scrutiny by government and citizens alike. Even in the flagship state of Nevada, operation of a gambling enterprise is explicitly defined as a "privilege," an activity quite apart from running a restaurant, manufacturing furniture, or raising cotton.

Unlike other businesses in which the market is the principal determinant, the shape and operation of legalized gambling has been largely a product of government decisions. This is most obvious in the state lotteries, where governments have not just sanctioned gambling but have become its enthusiastic purveyors, legislating themselves an envied monopoly; and in Native American tribal gambling, where tribal nations own, and their governments often operate, casinos and other gambling enterprises.

But the role of government is hardly less pervasive in other forms of gambling: Governments determine which kinds of gambling will be permitted and which will not; the number, location, and size of establishments allowed; the conditions under which they operate; who may utilize them and under what conditions; who may work for them; even who may own them. All of this is in addition to the normal range of governmental activity in areas such as taxes, regulations, and so forth. And, because governments determine the level and type of competition to be permitted—granting, amending, and revoking monopolies, and restricting or enhancing competition almost at will—they also are a key determinant of the various industries' potential profits and losses.

No Master Plan

To say that gambling has grown and taken shape in obeisance to government decisions does not imply that there was a well thought-out, overall

plan. All too commonly, actual results have diverged from stated intentions, at times completely surprising the decisionmakers. There are many reasons for this awkward fact.

In the U.S. federalist system, use of the term "government" can easily mislead: Far from a single actor with a clear-eyed vision and unified direction, it is in fact a mix of authorities, with functions and decisionmaking divided into many levels—federal, state, local, and others, including tribal. Each of these plays an active role in determining the shape of legalized gambling. The states have always had the primary responsibility for gambling decisions and almost certainly will continue to do so for the foreseeable future. Many states, however, have delegated considerable authority to local jurisdictions, often including such key decisions as whether or not gambling will be permitted in their communities. And the federal government plays an ever-greater role: Indian gambling sprang into being as a result of federal court decisions and congressional legislation; and even the states concede that only Washington has the potential to control gambling on the Internet.

And almost none of the actors coordinate their decisions with one another. The federal government did not poll the states when it authorized Indian gambling within their borders, nor have Mississippi and Louisiana—nor, for that matter, any other state—seen fit to adopt a common approach to gambling. In fact, rivalry and competition for investment and revenues have been far more common factors in government decisionmaking regarding gambling than have any impulses toward joint planning.

Those decisions generally have been reactive, driven more by pressures of the day than by an abstract debate about the public welfare. One of the most powerful motivations has been the pursuit of revenues. It is easy to understand the impetus: Faced with stiff public resistance to tax increases as well as incessant demands for increased or improved public services from the same citizens, tax revenues from gambling can easily be portrayed as a relatively painless method of resolving this dilemma.

Lotteries and riverboat casinos offer the clearest examples of this reactive behavior on the part of legislatures. The modern history of lotteries demonstrates that when a state authorizes a lottery, inevitably citizens from neighboring states without lotteries will cross the border to purchase tickets. The apparent loss of potential tax revenues by these latter states often gives rise to demands that they institute lotteries of their own, in order to keep this money in-state, for use at home. Once any of these states installs a lottery, however, the same dynamic will assert itself in still other states further afield. This competitive ripple effect is a key reason why lotteries now exist in 37 states and the District of Columbia, with more poised to join the list.

The same pattern surfaced in legislative debates regarding riverboat casinos. As the great majority of these casinos have been sited on borders with other states, they quickly gave rise to charges of one state "raiding" the pocketbooks of its neighbors. This often prompted cries in the affected states to respond by licensing their own riverboats which, when generously distributed along their own borders, in turn, often stimulated similar reactions from other states far removed from the original instigator. For both lotteries and riverboat casinos, the immediate legislative attempt to capture fleeing tax dollars created a powerful yet usually unacknowledged dynamic for the expansion of gambling. Some believe another contributing factor has been the increasing volume of political contributions from interests with an economic stake in virtually every place expansion is sought.

Critics have asserted that this legislative pursuit of revenues has occurred at the expense of consideration of the public welfare, a serious charge indeed, albeit an unproveable one. But advocates have successfully deployed many other arguments for legalizing or expanding gambling: economic development for economically depressed areas, the general promotion of business for the investment and employment opportunities it can bring with it, undermining illegal gambling and the organized crime it supports, and so forth. There is even the eminently democratic motivation of responding

to public demand: A number of election campaigns and referenda have been successfully waged on the issue of legalizing or expanding gambling.

THE LACK OF INFORMATION

Presumably, many of the debates could be settled if either the benefits or costs of gambling could be shown to be significantly greater than the other. But such a neat resolution has evaded would-be arbiters. Efforts to assess the various claims by proponents and opponents quickly encounter gambling's third defining characteristic—the lack of reliable information. Regarding gambling, the available information on economic and social impact is spotty at best and usually inadequate for an informed discussion let alone decision. On examination, much of what Americans think they know about gambling turns out to be exaggerated or taken out of context. And much of the information in circulation is inaccurate or even false, although often loudly voiced by adherents. Add to this the fact that many of the studies that do exist were contracted by partisans of one point of view or another and uncertainty becomes an understandable result. Nevertheless, decisions must be made and governments have shown little hesitation in making them.

The problem is not simply one of gathering information. Legalized gambling on a wide scale is a new phenomenon in modern America and much of the relevant research is in its infancy. Many phenomena are only now beginning to be recognized and defined, a prerequisite to gathering useful information. And many of the key variables are difficult to quantify: Can the dollar costs of divorce or bankruptcy adequately capture the human suffering caused by problem gambling?

The more difficult the measurement; the more the weighing of competing claims retreats from science to art or, with even greater uncertainty, to politics. Nevertheless, the lack of information will not reduce the pressures on governments to make decisions.

To take but one example: What are the economic impacts of gambling? The answer in great part depends on the context selected. On an individual basis, it is obvious that some people benefit and others do not, including both gamblers and nongamblers. The larger the group examined, however, the more ambiguous the possible conclusions. Single communities boasting a positive impact can readily be found, but the radius of their concerns usually does not extend to surrounding areas where negative consequences for others may surface as a direct consequence of this good fortune, such as loss of business, increases in crime, reduced tax revenues, and problem gamblers taking their problems home.

For example, gambling has been touted as an instrument of economic development, especially for poorer areas. In communities like Tunica, Mississippi, the arrival of large-scale gambling has had a highly visible and generally positive role, bringing with it capital investment, increased tax revenues, and enhanced public services, as well as vastly expanded employment opportunities and health-care benefits for many people who formerly were without much of either. But some argue that that prosperity is offset by negative impacts in the surrounding area, including nearby Memphis, a major source of casino patrons. But even if the communities in the immediate area were seen to benefit, or at least not to suffer, what can be said about the impact beyond? Is California hurt, helped, or left untouched by gambling in Nevada? Some claim that Californians leave their spending money and tax dollars in Nevada and bring back a slew of economic and social costs, such as pathological gambling. There are surprisingly few independent studies that have addressed issues such as these. And as for the impact on the national economy, efforts to estimate the net impact of gambling on national statistics such as investment, savings, economic growth, and so forth, break down in the face of our limited knowledge.

But even when the economic benefits are clear and agreed upon, there are other equally important issues to be decided. In fact, the heart

of the debate over gambling pits possible economic benefits against assumed social costs. What are the broad impacts of gambling on society, on the tenor of our communities' lives, on the weakest among us? Because they inevitably involve highly subjective, non-quantifiable factors, assessing these is a more controversial exercise than the more pleasant task of estimating economic benefits. How can one ruined life be compared with the benefits provided to another? How can the actual costs of gambling-related crime be measured? Where is the algorithm that would allow the pursuit of happiness to be measured against the blunt numbers of pathological gambling?

Time for a Pause

It may be that the expansion of gambling accurately reflects the will of the people, as expressed in referenda, state legislatures, tribal reservations, and in Washington. The impressive financial resources already accounted for by businesses, workers, and public officials further strengthen the industry's ability to voice its interests. This Commission, however, believes that gambling is not merely a business like any other and that it should remain carefully regulated. Some Commissioners would wish it to be far more restricted, perhaps even prohibited. But overall, all agree that the country has gone very far very fast regarding an activity the consequences of which, frankly, no one really knows much about.

In an attempt to better understand those consequences, this Commission has examined many issues, received testimony from hundreds of individuals and organizations, and deliberated over a period of 2 years. This broad ingathering of information and discussion of issues will be reflected in the following chapters, which outline the parameters of the many debates, discuss the available evidence, and offer recommendations. Inevitably for a Commission of such diverse makeup, some differences in viewpoint refuse to melt away and the existing evidence is insufficient to compel a consensus. But there is an encouraging breadth of agreement among

Commissioners on many individual issues, such as the immediate need to address pathological gambling; and on one big issue: The Commissioners believe it is time to consider a pause in the expansion of gambling.

The purpose of the pause is not to wait for definitive answers to the subjects of dispute, because those may never come. Additional useful information is, of course, to be hoped for. But the continuing evolution of this dynamic industry has produced visible changes even in the short lifetime of this Commission and indicates that research will always trail far behind the issues of the day and moment. Instead, the purpose of this recommended pause is to encourage governments to do what to date few if any have done: To survey the results of their decisions and to determine if they have chosen wisely.

To restate: Virtually every aspect of legalized gambling is shaped by government decisions. Yet, virtually no state has conformed its decisions in this area to any overall plan, or even to its own stated objectives. Instead, in almost every state whatever policy exists toward gambling is more a collection of incremental and disconnected decisions than the result of deliberate purpose. The record of the federal government is even less laudatory. It is an open question whether the collective impact of decisions is even recognized by their makers, much less wanted by them. Does the result accord with the public good? What harmful effects could be remedied? Which benefits are being unnecessarily passed up?

Without a pause and reflection the future does indeed look worrisome. Were one to use the experience of the last quarter century to predict the evolution of gambling over the next, a likely scenario would be for gambling to continue to become more and more common, ultimately omnipresent in our lives and those of our children, with consequences no one can profess to know.

The Commission, through its research agenda, has added substantially to what is known about the impact of gambling in the United States. The

Commission also has tried to survey the universe of information available from other sources. But it is clear that Americans need to know more. In this context, the Commission's call for a pause should be taken as a challenge—a challenge to intensify the effort to increase our understanding of the costs and the benefits of gambling and deal with them accordingly. Policymakers and the public should seek a comprehensive evaluation of gambling's impact so far and of the implications of future decisions to expand gambling. In fact, state and local versions of this Commission may be an appropriate mechanism to oversee such research. If such groups are formed they will find as did the Commission that the search for answers takes time. Therefore, some policymakers at every level may wish to impose an explicit moratorium on gambling

expansion while awaiting further research and assessment.

Although some communities may decide to restrict or even ban existing gambling, there is not much prospect of its being outlawed altogether. It is clear that the American people want legalized gambling and it has already sunk deep economic and other roots in many communities. Its form and extent may change; it may even disappear altogether. But for the present, it is a reality. The balance between its benefits and costs, however, is not fixed. To a welcome extent, that appears to lie within our power to determine. We can seek to shape the world we live in or simply allow it to shape us. It is in service of the former that this *Final Report* and its recommendations are offered.

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upon the exclusive authority of the governor to commute sentences, a judge may enter an order setting aside such conviction after the sentence imposed by the court has been served providing that all of the elements required for such action by Act 213, P.A. 1965, supra, are present.

FRANK J. KELLEY,
Attorney General.

ADMINISTRATIVE RULES: Legislature — Power to suspend under Act 88, P.A. 1943.

CONSTITUTIONAL LAW: Joint Committee on Administrative Rules — Power to suspend administrative rules under Mich. Const. 1963, Art. IV, Sec. 37.

Only the joint committee on administrative rules, acting between sessions under Mich. Const. 1963, Art. IV, Sec. 37, as to rules promulgated during that period, has the actual power to suspend an administrative rule.

During legislative sessions, the only true power of the legislature to suspend a pending administrative rule or regulation, is by bill, the "legislative disapproval" of a pending rule by concurrent resolution under Section 8c of Act 88, P.A. 1943, being no more than a recommendation to the promulgating agency to withdraw or amend the rule. If the recommendation is disregarded, the legislature must act by bill.

Because of Mich. Const. 1963, Art. IV, Sec. 22, requiring that all legislation be by bill, Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules, acting by concurrent or other resolution, power to suspend an administrative rule promulgated during sessions.

Said Act 88, P.A. 1943, may, however, constitutionally be amended to give the joint committee on administrative rules the "legislative disapproval" authority given the legislature itself under Sec. 8c of said Act, because said authority amounts only to a recommendation.

No. 4586

July 13, 1967.

Honorable Robert J. Huber, Chairman
Joint Committee on Administrative Rules
State Senate
The Capitol
Lansing, Michigan

Your inquiry, under date of May 4, 1967, relative to the legislature's power to suspend administrative rules promulgated under Act 88, P.A. 1943, is respectfully acknowledged.

Since the inquiry comprehensively involves Article IV, Section 37 of the Michigan Constitution of 1963, as well as the provisions of said Act 88 itself, orderly treatment suggests that the applicable constitutional and statutory material first be generally recited, after which your several questions will be stated and answered seriatim.

A. Article IV, Section 37 of Michigan Constitution 1963 provides as follows:

"The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session."

B. Article IV, Section 22:

"All legislation shall be by bill and may originate in either house."

C. Article IV, Section 27:

"No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."

D. Article IV, Section 17:

"Each house of the legislature may establish the committees necessary for the efficient conduct of its business and the legislature may create joint committees. On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. . . ."

E. Section 1a of said Act 88, P.A. 1943, being M.S.A. § 3.560(7a) (C.L. 1948 § 24.71a), as amended, provides in part as follows:

" . . . Prior to the adoption, amendment or repeal of any rule, the state agency *shall* publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing. . . ." (Emphasis added)

F. Section 1b of said Act 88, P.A. 1943, being M.S.A. § 3.560(7b) (C.L. 1948 § 24.71b), as amended, provides as follows:

"*The legislature reserves the right to approve, alter, suspend or abrogate any rule promulgated pursuant to the provisions of this act.*" (Emphasis added)

G. Section 4 of said Act 88, P.A. 1943, being M.S.A. § 3.560(10) (C.L. 1948 § 24.74), as amended, provides in part as follows:

"No rule made by any state agency shall be *filed* with the secretary of state *until* it has been *approved* by the legislative service bureau as to form and section numbers and the attorney general as to legality *and* has been *subsequently confirmed and formally adopted* by the promulgating state agency in accordance with law." (Emphasis added)

"No rule made by a state agency shall *become effective until* an original and 2 duplicate copies thereof have been *filed* in the office of the secretary of state *and until such rule has been published* in the supplement to the Michigan administrative code, as provided in section 6. . . ." (Emphasis added)

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H. Section 6 of said Act 88, P.A. 1943, being M.S.A. § 3.560(12) (C.L. 1948 § 24.76), as amended, provides in part as follows:

"The secretary of state shall:

"Compile, publish and index supplements to the Michigan administrative code, which supplements shall be published every 3 months. Such quarterly supplements shall contain all rules filed in the office of the secretary of state not less than 30 days before the end of the preceding calendar quarter, bear a publication date and certification of period covered by the rules contained therein."

"Quarterly supplements shall be published not later than 45 days after the close of the period covered thereby." (Emphasis added)

I. Section 8b of said Act 88, P.A. 1943, being M.S.A. § 3.560(14b) (C.L. 1948 § 24.78b), as amended, provides as follows:

"All rules promulgated by any state agency, including all rules filed with the secretary of state and published as provided by law, shall be transmitted to the secretary of the senate and the clerk of the house of representatives and to each member of the legislature by the secretary of state before the first day of the regular session of the legislature next following the promulgation or publication thereof. The secretary of state shall similarly file during any regular session of the legislature all rules promulgated between the first day of the regular session and the short adjournment thereof. The secretary of the senate and the clerk of the house of representatives shall lay all such rules before the senate and house of representatives, and the same shall be referred to the joint committee on administrative rules in the same manner as bills are referred to standing committees." (Emphasis added)

J. Section 8c of said Act 88, P.A. 1943, being M.S.A. § 3.560(14c) (C.L. 1948 § 24.78c), as amended, provides as follows:

"If the committee to which any such rule shall have been referred, or any member of the legislature, shall be of the opinion that such rule is violative of the legislative intent of the statute under which such rule was made, a concurrent resolution may be introduced declaring the legislative intent and expressing the determination of the legislature that such rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule, but rejection of the resolution shall not necessarily be construed as legislative approval of such rule. If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation." (Emphasis added)

K. Section 8d of said Act 88, P.A. 1943, being M.S.A. § 3.560(14d) (C.L. 1948 § 24.78d), as amended, provides as follows:

"The secretary of state shall transmit to the legislative service bureau a sufficient number of copies of all rules and regulations filed in the office of the secretary of state from the time of the short adjournment of the last regular session of the legislature and during the interim until the next regular session thereof, for the use of the joint committee on administrative rules." (Emphasis added)

L. Section 8f of said Act 88, P.A. 1943, being M.S.A. § 3.560(14f) (C.L. 1948 § 24.78f) provides in part as follows:

"The joint committee on administrative rules is created which may meet during sessions of the legislature and during the interims between sessions and to which shall be referred all rules promulgated pursuant to this act.

* * *

"The committee shall consider all rules referred to it and shall conduct hearings on such rules as it deems necessary. If authorized by concurrent resolution of the legislature, the committee may suspend any rule or regulation promulgated subsequent to the adjournment of the last preceding regular session of the legislature. The committee shall notify the promulgating state agency and the secretary of state of any rule it suspends, which rule shall not be published in the administrative code or supplement while so suspended." (Emphasis added)

(1) Your initial inquiry asks the general power of the legislature, while in session, to suspend, amend or abrogate, first, rules filed but not yet effective; next, rules filed and effective.

Under above reference I (Section 8b of the Administrative Code Act, being Section 8b of said Act 88, P.A. 1943, as last amended by Act 161, P.A. 1964), a promulgated but not yet published or effective rule is filed by the Secretary of State with the secretary of the senate and clerk of the house, who place it before senate and house respectively. The senate and house then refer it to the joint committee on administrative rules. Thereafter, under reference J (Section 8c of said Act, as amended), if either said joint committee or any legislator feels that the promulgated and pending (but not yet effective) rule violates the legislative intent of the statute under which the rule was made, "a concurrent resolution may be introduced declaring the legislative intent and expressing the determination of the legislature that the rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule . . ." (The statute goes on to state that rejection of the resolution shall not necessarily be construed as legislative approval of the rule.)

You will note that the language of reference J (said Section 8c, as amended) restricts the legislature, by its concurrent resolution, to a determination that the "rule should be revoked or altered," and that such determination constitutes "disapproval." Relative then to that part of your inquiry which concerns "the power . . . to suspend, amend or abrogate," we find no such power under reference J, and (also, because any authority of the joint committee on administrative rules, to suspend a rule under reference A or reference L, exists only in the interim between legislative sessions [though such suspension itself may carry through a succeeding session]), must have recourse to the general authority of reference F (Section 1b of the Act). Under said general authority (particularly in the light of reference B), it is readily inferable that any action by the legislature to amend a rule must be by bill under regular legislative procedure. However, when you inquire (as does your first question) as to legislative action to "abrogate" a pending but not effective rule, it is my opinion that your first action should be under the earlier discussed "legislative disapproval" pro-

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cedure of reference J. A bill will not be necessary if the promulgating agency itself acts to abrogate the rule. Similarly, authority to (effectively) "suspend" a promulgated rule which is not yet effective, lies, at least originally, in that same "legislative disapproval" procedure, because the promulgating agency is thus given opportunity to withdraw the rule. Under references G, H, and J, a pending rule would, unless withdrawn, clearly go on to publication and effective rule status. As the first effort, therefore, to avert such result, (and, accordingly, to "suspend" a pending rule), the disapproval procedure is indicated. At that point, of course, it is procedure by concurrent resolution. However, if that action fails (through neglect or refusal of the promulgating agency to withdraw the rule), your only recourse is to act by bill.

As to rules (under part b. of your aforesaid first question) that have already become effective, it is clear that any action by the legislature under its reserved power (reference F) to "... alter [amend], suspend or abrogate" such rules, would be legislation, and therefore must be by bill (reference B).

(2) Your second question is as follows: May the legislature when in regular session, suspend (not amend or abrogate) temporarily or permanently, rules or regulations by concurrent resolution?

As will possibly occur again herein, your question (2) converges upon question (1), or at least this opinion's treatment thereof. As earlier stated, administrative rules or regulations, *already* duly processed to *effective* status under the Administrative Code (said Act 88, P.A. 1943, as amended), may *not* be suspended, whether temporarily or permanently, by concurrent resolution. Though it has never been formally so adjudicated, the intent of said Administrative Code clearly appears to be to give the effect of law to an administrative rule duly adopted under its provisions. Certainly, as to both federal administrative agencies and those of many states, it has repeatedly been held that administrative rules have the force of law. The general rule is stated in 2 Am. Jur. 2d 119 (Administrative Law, § 292) as follows:

"Rules, regulations, and general orders enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law, ... [citing]

Public Utilities Com. v. United States, 355 U.S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh den 356 U.S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713;

Atchison, T. & S.F.R. Co. v. Scarlett, 300 U.S. 471, 81 L. ed. 748, 57 S. Ct. 541, reh den 301 U.S. 712, 81 L. ed. 1365, 57 S. Ct. 787;

United States v. Michigan Portland Cement Co., 270 U.S. 521, 70 L. ed. 713, 46 S. Ct. 395;

Aldridge v. Williams (U.S.) 3 How. 9, 11 L. ed. 469;

State v. Friedkin, 244 Ala. 494, 14 So. 2d 363;

McSween v. State Live Stock Sanitary Bd. 97 Fla. 750, 122 So. 239, 65 A.L.R. 508;

Pierce v. Doolittle, 130 Iowa 333, 106 N.W. 751;

Union Light, Heat & Power Co. v. Public Service Com. (Ky.) 271 S.W. 2d 361;

Connell v. Bauer, 240 Minn. 280, 61 N.W. 2d 177, 40 A.L.R. 2d 776;

Bailey v. State Bd. of Public Affairs, 194 Okla. 495, 153 P. 2d 235;

Foley v. Benedict, 122 Tex. 193, 55 S.W. 2d 805, 86 A.L.R. 477;

Smith v. Highway Board, 117 Vt. 343, 91 A. 2d 805.

Such administrative rules, then, may be suspended (or amended or abrogated) only by constitutionally ordained legislative process, namely by bill.

The same view has been expressed at some length by a predecessor in my office in the course of an extended opinion on the subject of rules adopted pursuant to the Administrative Code. Please see O.A.G. 1957-58, Vol. II, Op. No. 3352, p. 246, wherein at pp. 253 and 254 it was stated as follows:

"Clearly, when the legislature delegates the rule-making power to a state agency, it is pursuant to a legislative act initiated by a bill. Such delegated power may be suspended or entirely revoked in any particular instance at any time the legislature may see fit. But to suspend or entirely revoke a law conferring rule-making power requires the passage of another law, initiated by bill and subject to the veto power. In my opinion the rule itself, being the product springing from the exercise of the rule-making power, cannot lawfully be suspended, altered or abrogated by the legislature except by the passage of a bill by the legislature which becomes a law. To hold otherwise permits the legislature to circumvent the conditional mandate imposed on the passage of legislation and to deprive the governor of veto power by use of the concurrent resolution. What the legislature is prohibited from doing directly, it is prohibited from doing indirectly.

*" * * * nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential." 1 Cooley, Constitutional Limitations, 8th Ed., p. 266.*

*"Based on what has been said hereinbefore, I am of the opinion that the legislature by the adoption of a concurrent resolution may not constitutionally suspend, alter or abrogate a rule or regulation promulgated by a state agency and in effect pursuant to delegated rule-making power. * * *"* (Emphasis added)

(3) This question inquires whether the legislature may give to the joint committee on administrative rules the same power to suspend rules or regulations promulgated *during regular session* (to no longer than the end of the next session), which that committee now has, by force of constitution (reference A) and statute (reference L), but only as to rules or regulations promulgated *subsequent to adjournment*. The answer is no. The legislature may not of course accomplish indirectly what it cannot do directly. As earlier recited herein, the only existing "authority" of the legislature itself (other than acting by bill) to suspend rules or regulations filed during session, is the "legislative disapproval" procedure under reference J, more

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specifically the adoption of a concurrent resolution that "such rule should be revoked or altered." As also indicated however, such action, rather than *suspending* the rule, effects "legislative disapproval." It should be noted that this entire procedure *assumes* that, upon such legislative disapproval being recorded, the promulgating agency will either withdraw the rule from further processing toward effective status, or alter it as desired. This is made clear by reference J's final sentence which (to cover the contingency of a recalcitrant agency) provides as follows:

"If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation."

All of this serves only to emphasize the basic reality that, by force of Michigan Constitution 1963, Article IV, Section 22 (reference B), the legislature acts effectively only by *laws*. A concurrent resolution does not have the force and effect of law, and is "not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." See *Becker v. Detroit Savings Bank*, 269 Mich. 432, at 434, 435.

Our mention of a "statutory" source of the power of the joint committee on administrative rules to suspend rules or regulations promulgated *between* sessions, should not be misunderstood. Except for Michigan Constitution 1963, Article IV, Section 37 (reference A), specifically authorizing the legislature to confer this power on said joint committee between sessions, the power could not exist. The statute (reference L) represents nothing more than legislative action pursuant to said constitutional authorization. Finally, since the constitutional authorization is specifically restricted to rules and regulations promulgated *between* sessions, the legislature is without authority to confer the power on the joint committee *during* sessions.

(4) a. As already indicated, the legislature's "authority" to *suspend*, by concurrent resolution, a rule or regulation filed *during session*, lies indirectly in the "legislative disapproval" procedure under reference J, whereby said resolution expresses "the determination of the legislature that such rule should be revoked or altered." It depends, of course, on cooperative action of the promulgating agency to withdraw or amend the rule.

Because of reference B ("All legislation shall be by bill"), Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules the actual legal *power* to suspend, by concurrent or other resolution, rules or regulations filed *during session*.

b. Since, however, the very "authority" of the legislature itself to record "legislative disapproval," constitutionally accomplishes, as we have noted but risk repetition to emphasize, no more than a recommendation to the administrative agency to withdraw or amend its pending rule, and since the legislature might conceivably find it useful, in the area of pending administrative rules, to have some such authority of recommendation reposed in its joint committee, I hasten to add that I see no constitutional obstacle to the amendment of Act 88, P.A. 1943, to that innocuous end. Former Section 8e of the Act (M.S.A. § 3.560(14e); C.L. 1948 § 24.78e; repealed by Act 161, P.A. 1964) gave such authority to the joint committee, but only

between sessions and as to "rules . . . which have not been theretofore considered by the legislature."¹ Neither 1947-48 O.A.G. No. 458, p. 378 (considering a comparable statutory provision) nor earlier quoted 1957-58 O.A.G. No. 3352 (Vol. II) p. 246 (at which time Section 8e was in the same form as when finally repealed) undertook to pass on the constitutionality of such a statute as to pending but not yet effective rules. As you will note, Section 8e authorized a resolution which was not only a mere recommendation ("ought to be revoked or altered"), but actually a *preliminary* recommendation; that is, preliminary to the full legislature's later recommendation (by joint resolution) of "legislative disapproval," in the event the agency persisted in the offending rule. You may, of course, if you wish, use former Section 8e as the model for your amendment of said Act 88, suitably providing, however, for the joint committee to act *during* rather than *between* sessions. It will of course be necessary to remove the clause, "and which have not theretofore been considered by the legislature."

The inescapable legal fact of this situation of administrative rules is that the promulgating agency is exercising its lawful, statutorily-conferred, rule-making power. As suggested by earlier-quoted 1957-58 O.A.G. No. 3352 (Vol. II) p. 246 at pp. 253, 254 (though that opinion addressed itself exclusively to rules already effective), only a comparable legislative act, specifically a *statute*, can revoke that rule-making power, and accordingly only a *statute* can lawfully (except for Michigan Constitution 1963, Article IV, Section 37) suspend, or alter or abrogate a rule or regulation lawfully promulgated under that rule-making power. (See emphasized portion of said quotation.) In other words, the legislature may take away what it has *given by law*, but it must *take it away by law*. Any "law" purporting to authorize the legislature to revoke or suspend or amend either the rule-making power or its lawful product through the medium of committee, or even legislative resolution, would be unconstitutional and void.

¹ "The legislature may provide by concurrent resolution for the creation of a joint committee on administrative rules which shall be empowered to meet during the interim between sessions of the legislature, and to which shall be referred all rules promulgated pursuant to this act and which have not been theretofore considered by the legislature. The committee so created shall consider all such rules referred to it, and shall conduct hearings on those rules which in the opinion of the committee appear violative of the legislative intent of those statutes under which they were made. If, after hearing, the committee is of the opinion that any such rule ought to be revoked or altered, it may adopt a resolution to that effect setting forth the reasons therefor, and shall transmit such resolution to the agency affected. If, after such committee action, the agency involved persists in the offending rule, the committee or any member thereof, or any member of the legislature, may introduce at the next legislative session a concurrent resolution declaring the legislative intent and expressing the determination of the legislature that such rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule, but rejection of the resolution shall not necessarily be construed as legislative approval of such rule. If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation. The committee shall in every case report to the legislature at the commencement of its next session its doings in the interim. The committee shall also have such powers as are granted to it by any other statute."

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(5) Your final question inquires as to the changes, if any, necessary to be made in Michigan Constitution 1963, Article IV, Section 37 (reference A) to give the legislature power to suspend a pending but not yet effective administrative rule, promulgated *during* session, by concurrent resolution or by a resolution of the joint committee on administrative rules.

We should of course bear in mind that the present constitutional provision is obviously only a stop-gap device, designed to prevent the taking effect of administrative rules promulgated *between* sessions. The joint committee's power to suspend a rule "to the end of the next legislative session," is clearly intended only to defer that rule for legislative consideration at the following session. Thus, ultimate *legislative* action is not only contemplated, but constitutes the very purpose of the provision. In no way does that interim constitutional power envision the joint committee assuming the final constitutional responsibility and function of the legislature itself to consider and pass upon the rule. The language, "suspend," is that of postponement only, not an expedient of indirect legislative disapproval or rejection.

Moreover, in the context of present law, it takes no more than a concurrent resolution to express the "legislative disapproval" which will, in all likelihood, persuade the promulgating agency to withdraw or amend its rule. Legislation will rarely be necessary.

If, however, constitutional amendment is deemed necessary by you in the respect inquired, subject Article IV, Section 37, may be changed to read as follows:

"The legislature may, by either its concurrent resolution or the resolution of its joint committee on administrative rules, temporarily or permanently suspend any rule or regulation of an administrative agency, promulgated but not yet effective. Said joint committee may exercise such power as to rules or regulations promulgated between sessions."

This completes my answers to the several questions you have presented.

FRANK J. KELLEY,
Attorney General.

MOTOR VEHICLES: Test of driver for alcohol content. Performance of test by physician, nurse and medical technician.

The term "direction" in section 625a of the Motor Vehicle Code does not require the personal presence of a licensed physician when a licensed nurse or medical technician withdraws blood from a person for chemical analysis provided appropriate directions have been given by a licensed physician.

No. 4559

August 14, 1967.

Mr. John H. Butts
Prosecuting Attorney
Cheboygan, Michigan 49721

You have asked my opinion on the following question pertaining to Act 104, P.A. 1964, relating to the withdrawal of blood from a person for the purpose of analysis for alcohol content:

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LEGISLATURE—CONCURRENT RESOLUTION—A concurrent resolution adopted after the passage and signing of a bill for the purpose of correcting an error in the enacted bill does not have the effect of law.

October 17, 1939.

MR. WILLIAM F. SCHWEMLER,
Attorney at Law,
6200 Woodward Avenue,
Detroit, Michigan.

DEAR SIR:

Acknowledging receipt of your letter of October 13, 1939, we wish to supplement our opinion of July 7, 1939, to Lee C. Richardson, Director of the Motor Vehicle Division of the Department of State, with reference to Senate Concurrent Resolution No. 38, which provides:

"A concurrent resolution clarifying the Legislative intent relative to Act No. 274 of the Public Acts of 1939.

"Whereas, House Bill No. 19 which subsequently became Public Act No. 274 of the Public Acts of 1939, as amended in the House of Representatives, provided that the lien of garage keepers should have priority over all other liens to the amount of \$75.00, but that upon payment of such amount such lien should become ineffective as to any prior lien; and

"Whereas, During its consideration of said bill the Senate Judiciary Committee voted to reduce such limitation from \$75.00 to \$25.00, the report of the Committee containing the recommended amendments failed to show the necessary amendment in both places where said figure appeared and the amendments reported only contained one such amendment instead of two; and

"Whereas, Such bill was considered upon the floor of the Senate during the rush of the final days of the 1939 session and such mistake was not discovered until after the amendments had been adopted and agreed to, the bill enrolled and the act signed; and

"Whereas, Such mistake has resulted in the confusion as to the proper interpretation of the act; now therefore be it

"Resolved by the Senate (the House of Representatives concurring), That it was the intention of the Legislature in passing House Bill No. 19, which subsequently became Public Act No. 274 of the Public Acts of 1939, to limit the priority of garage keepers' liens over prior liens to the amount of \$25.00."

Journal of the House of Representatives, page 2052.

The question therefore arises as to what effect, if any, this resolution has upon Act No. 274 of the Public Acts of 1939. It has been held in several former opinions of the Attorney General that legislation cannot be instituted by concurrent resolutions and also that a law may not be amended by such method.

Attorney General Biennial Report, 1933-1934, page 275;
Attorney General Biennial Report, 1937-1938, page 203.

In an opinion of Hon. Patrick H. O'Brien, former Attorney General of the State of Michigan, (Attorney General Biennial Report, 1933-1934, page 275, *supra*) it was said:

"The Constitution of the State of Michigan, Article V, Section 19, provides as follows:

"All legislation by the legislature shall be by bill and may originate in either house of the legislature."

"Section 21 provides as follows:

"No law shall embrace more than one object, which shall be expressed in its title. No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length. No act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house."

"Section 22:

"No bill shall be passed or become a law at any regular session of the legislature until it has been printed and in the possession of each house for at least five days. No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message. No bill shall be altered or amended on its passage through either house so as to change its original purpose."

"Section 23:

"Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal."

"Attention is called to the fact that, under the Constitution of 1850, Article IV, Section 19, it was provided that every bill and joint resolution shall be read three times, etc. Under that provision of the Constitution it was possible for the legislature to originate legislation by a bill or a joint resolution. The Supreme Court of this state on various occasions, under the old constitutional provisions, had occasion to discuss joint resolutions and their effect."

"It was determined by the court that a joint resolution was a form of legislation used chiefly for administrative purposes, of a local or temporary character."

"Kelly vs. State, 149 Mich. 343;

Olds vs. State Land Commissioner, 134 Mich. 447.

"The Constitution of 1908, it will be noted, left out the term 'joint resolution' and provided specifically in Section 19, that all legislation shall be by bill."

"The construction to be placed upon the Constitution, we believe, is the same as statutory construction which may be summarized as follows:

"It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions." 25 R.C.L. 983.

"Under the legal maxim of construction that express mention of one thing implies the exclusion of other similar things, there is reason in the contention that, the act having expressly named certain liens made subordinate, it by implication excludes others not mentioned, upon the presumption that, having designated some, the legislature designated all it was intended the act should include."

"Marshall v. Wabash R. Co., 201 Mich. 187.

"Under the rule above quoted, a joint or concurrent resolution cannot be construed to be authorized for the purpose of originating or amending legislation."

"Joint Resolution No. 95 was introduced June 16, 1933, and was passed on the same date."

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"Section 22 of the Constitution above quoted, provides that no bill shall be passed or become a law until it has been printed and in possession of each house for at least five days.

"The resolution referred to was passed in less than five days, and clearly is a direct violation of the constitutional provision, if it could be construed as a bill. We concluded that the joint resolution under no section of the Constitution of the State of Michigan can be interpreted as being a bill, and therefore, it follows that this resolution is void and of no effect."

We conclude therefore that the concurrent resolution in question will have no effect on Act No. 274 of the Michigan Public Acts of 1939, and that the Act will stand as passed by the Legislature and signed by the Governor.

Very truly yours,

THOMAS READ,

Attorney General.

VHS:rb

HOSPITAL COMMISSION—Has authority to make rules and regulations relative to employees of state hospitals.

Said commission may by regulation limit the number of legal holidays, exclusive of Sunday, during which certain employees may take "time off."

October 18, 1939.

MR. CHARLES F. WAGG,
Executive Secretary,
State Hospital Commission,
509 City National Building,
Lansing, Michigan.

DEAR SIR:

You have recently requested the advice of this Department as to the authority of the State Hospital Commission to establish a policy which would deprive certain employees in your hospitals of time off for legal holidays.

You specifically add that your contemplated regulation will not be applied to all employees, but only to those employees whose presence is required for "the efficient and orderly operation of the hospital."

The statute governing legal holidays, same being Sections 9085 and 9086, Compiled Laws of 1929, designates certain holidays to be observed in the acceptance and payment of bills of exchange, bank checks and promissory notes and in the banking business, and so forth, but neither of said sections carry language prohibitive of labor on any of said days. The statutory designation that legal holidays shall be treated and considered "as the first day of the week, commonly called Sunday," has reference to specific purposes of designation recited therein, none of which said designated purposes include work or labor, either physical or mental.

Act 104 of the Public Acts of 1937, same being in the nature of a recodification of the laws organizing hospitals for the insane, et cetera, and creating a state hospital commission and defining its powers and duties, provides in Section 1a thereof that the commission shall "adopt all rules and regulations governing the policies of the commission," et cetera, and subsection 2 of Section 2 of said act provides:

"Second, Take charge of the general interests of the institutions herein named and see that its design is carried into effect according to law and its by-laws, rules and regulations."

Subsection 7 of said Section 2 provides:

"Seventh, Establish such by-laws, rules and regulations as they may

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paid into the township treasury, including all moneys that accrue to his township on account of non-resident highway taxes, and shall pay over and account for the same, according to the order of such township, or the officers thereof duly authorized in that behalf; and shall perform all such other duties as shall be required of him by law."

You will notice the amending statute omits the clause pertaining to eligibility of township treasurers to that office for more than two years in succession.

Page 925 of Vol. 59 of Corpus Juris reads as follows:

"An amendatory act which provides that the original statute shall be amended, so as to read as follows, or otherwise purports to set out in full all that the statute as amended is intended to contain, becomes a substitute for the original: * * *"

Therefore we believe that Act 16 of the Public Acts of 1935 by amending Section 1016 of the Compiled Laws of 1929 thereby removes the restriction upon township treasurers running for the same office more than once in succession.

Very truly yours,

THOMAS READ,

Attorney General.

JMB:mp

STATE LANDS—May be conveyed only by legislative enactment. A Senate Resolution is not a legislative enactment.

February 1, 1939.

MR. JOHN B. STRANGE,
Commissioner, State Department
of Agriculture,
Lansing, Michigan.

DEAR SIR:

Receipt is acknowledged of a copy of Senate Resolution No. 15, adopted January 25, 1939, and providing as follows:

"Resolved, That the Attorney General of the State of Michigan and the Board of Control of the Michigan State Fair be and they are hereby directed to take the proper legal steps to provide for the dedication to the City of Detroit of a sufficient amount of State Fair property to insure a public street extending north from State Fair Avenue, as Ralston Avenue would be extended, to the Eight Mile Road: Provided however, That provisions are made for the right of the State Fair Association to close the gates, thus temporarily suspending the use of such street when and if, in the judgment of the State Fair authorities, it is to the best interest in the operation of the State Fair that the said gates be closed during the period of holding the said Michigan State Fair."

Attention should first be called to the fact that "Board of Control of the Michigan State Fair" is a misnomer, the correct title being "Board of Managers of the Michigan State Fair."

The powers of this board are prescribed by Section 5004, Compiled Laws of Michigan for the year 1929, as follows:

"The control of all lands and other property that now is, or hereafter may be, vested in the state of Michigan, or in the people of said state, for the purpose of holding and conducting agricultural and industrial fairs, and for other agricultural purposes, is hereby placed in the state department of agriculture. The state department of agriculture is authorized to accept, on behalf of the state, grants and conveyances of property

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for such purposes or for any other purpose within the scope of this act, and to consent to such conditions affecting the use thereof as may be agreed upon. All grants and conveyances shall be taken in the name of the people of the state of Michigan."

Emphasis is placed upon the fact that the title to the land occupied by the Michigan State Fair in Wayne County rests in the people of the State of Michigan by conveyance made April 6, 1921.

The resolution in question attempts to bring about a conveyance of a portion of this land. That conveyance may be made by the state is unquestioned, but the method of conveyance here attempted is not effectual.

"A state has in general the same rights and powers in respect of property as an individual. It may acquire property, real or personal, by conveyance. * * * The power of the state in respect of its property rights is vested in the legislature, and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose.

"State property cannot be sold or disposed of except by authority of law, but, subject to constitutional restrictions, the state, like any individual owner of property may convey its property in any way it sees fit, and its grant may be express or by necessary implication. The power to dispose of state property is vested in the legislature." 59 Corpus Juris 164, 167.

"A state board empowered to take and hold the title to property for state purposes does not own such property in any proprietary sense. It is state property, to all intents and purposes, the same as in the case of title thereto being formally vested in the state." 25 R. C. L. 389.

Previous opinions of this department have dealt with the authority of the State Board of Agriculture and the Managers of the State Fair. Attention is directed to the Biennial Report of the Attorney General for the years 1933-34 at Page 131 where it is said:

"I find nothing in the above section of the statute which gives the state board of agriculture any authority to sell, convey or lease any of the lands in control of said board. * * * I am constrained to hold that there is no authority for either the state board of agriculture or the board of managers of the state fair to lease any of the state fair property without legislative enactment."

If a lease may not be made without legislative enactment, a fortiori a deed or conveyance such as that contemplated by the present Resolution cannot be made without legislative enactment.

A similar question was passed upon by this department in connection with the authority of the State Hospital Trustees. Justice W. W. Potter, then Attorney General of this State, concluded:

"that only the legislature of the state by the enactment of a law may authorize the conveyance of state property." Opinions of the Attorney General, 1926-28, Page 604.

In 1935 the question arose as to whether the Commissioner of Agriculture might lease the State Fair Grounds race track for racing purposes. It was held that authority was granted in Act No. 199, Public Acts of 1933, for this lease. Opinions of the Attorney General, 1935-36, Page 63.

It is to be noted, however, that a special legislative enactment gave this authority.

It is well settled that the Resolution under discussion does not have the force of law. The Constitution of this State, Chapter V, Sections 19 to 23, inclusive, deals with the methods to be followed in enacting laws of the State.

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Concurrent Resolutions of House and Senate have been held by this Department not to have the force of law. Opinions of the Attorney General, 1963-34, Page 321. This holding was affirmed by the Supreme Court of this State in the following cases:

Becker v. Detroit Savings Bank, 269 Mich. 432;
Boyer-Campbell Co. v. Fry, 271 Mich. 282.

In the latter case it is said:

"Legislative resolutions are not law, although they are entitled to respectful consideration."

We therefore conclude:

1. That title to the property occupied by the Michigan State Fair is in the people of the State of Michigan.
2. That conveyance of land belonging to the people of the State of Michigan can be made only by legislative enactment.
3. That the Senate Resolution No. 15 is not a legislative enactment.
4. That Senate Resolution No. 15 is of no legal significance as regards the purposes apparently intended.

Very truly yours,

THOMAS READ,
 Attorney General

KGP:mns

CORPORATIONS—Sec. 3 of Act 85 of the P. A. of 1921 as amended, does not require that fees provided for in section 11 of Act 419 of P. A. of 1919 be paid by corporations renewing their corporate existence.

February 1, 1939.

MR. PAUL H. TODD, Chairman,
 Mich. Public Utilities Commission,
 Lansing, Michigan.

DEAR SIR:

You have requested the opinion of this department as to the applicability of the provisions of Section 3 of Act 85 of the Public Acts of 1921, as amended, on the right to charge "securities fees" provided for in Section 11 of Act 419 of the Public Acts of 1919, from corporations renewing their corporate existence.

You specifically inquire as to whether "the renewal of corporate existence carries with it such a *reissuance of securities* as to call for payment of the securities fees provided for in Act 419 of the Public Acts of 1919.

The only authority of your commission to collect so-called "securities fees" is that found in Act 419 of the Public Acts of 1919, entitled "An Act to provide for the regulation and control of certain public utilities operated within this state; to create a public utilities commission and to define the powers and duties thereof" etc. Section 11 thereof, same being Section 11016 of the Compiled Laws of 1929, reads in parts as follows:

"Whenever any stocks, bonds, notes or other evidences of indebtedness are authorized by the commission to be issued in accordance with any law of this state, the party or parties upon whose application said securities are authorized shall before the issuance or sale of said securities, pay into the treasury of the state of Michigan a sum equal to one-tenth of one (1/10 of 1) per cent of the face value of the securities so authorized; the sum so paid not to be less than fifty (50) dollars in any case.

* * *

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terminals because of the limited period open to navigation allowing the bringing in of gasoline to be stored therein, whereas such a condition relative to pipe line storage terminals does not exist. A pipe line storage terminal is not restricted by the varying seasons of the year. Over the medium of its pipe line it may transport gas at all times of the year to suit its demands. It is obvious that there is a vast difference between the restricted seasonal unloading into a marine terminal storage and the year around unloading by pipe line into a pipe line terminal storage.

In conclusion, therefore, it is our opinion that gasoline held in pipe line terminal storage awaiting future wholesale bulk distribution is subject to taxation immediately on its coming to rest in Michigan.

Hoping this information will suffice for your purpose, I beg to remain

Very truly yours,

PATRICK H. O'BRIEN,

Attorney General.

WLB*1H*O

SALES TAX: Authority of board to pass resolution in nature of amendment; effect of a concurrent resolution as an amendment in construction of sales tax act.

August 31, 1933.

State Board of Tax Administration, Lansing, Michigan.

Attention: John K. Stack, Jr., Theodore I. Fry, Frank D. Fitzgerald and James E. Mogan.

Gentlemen:—It has been brought to my attention that the legislature on July 17, 1933, passed a resolution by the terms of which certain exemptions were to be allowed by your honorable body in the collection of the sales tax within this state.

Action by your body upon this resolution was deferred until August 30, 1933, at which time a resolution was passed by you wherein it is stated that exemptions shall be allowed and no tax collectible upon any article of personal tangible property which may be used in manufacturing purposes or in the production of tangible personal property.

We respectfully call your attention to the definition of a sale at retail as contained in Act 164, P. A. 1932, the definition is as follows:

"The term 'sale at retail' is defined in the act as being: 'Any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use or for any other purpose than for resale in the form of tangible personal property.'"

Under the provisions of this act preliminary and supplementary rules and regulations were promulgated and issued whereby sales at retail were given definite and more specific definitions. An examination of these rules and regulations leads me to the conclusion that the act was correctly interpreted.

As to the resolution passed by the legislature and the resolution passed by your body I desire to call your attention to the provisions of the constitution of this state which provides as follows:

Article V, Sec. 19:

"All legislation by the legislature shall be by bill and may originate in either house of the legislature."

Sec. 22:

"No bill shall be passed or become a law at any regular session of the legislature until it has been printed and in the possession of each house for at least five days. No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message. No bill shall be altered or amended on its passage through either house so as to change its original purpose."

Sec. 23:

"Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal."

A reading of the sections above quoted brings us to the conclusion that a bill may not be amended nor any legislation be instituted by a concurrent resolution. So, therefore, the resolution as passed by the legislature cannot be considered as an amendment to the sales tax act.

The act itself sets forth the duties of the commission. Section 21 of the act provides as follows:

"Administration and enforcement by state board of tax administration. There is hereby created a board to be known as the state board of tax administration, and herein called 'the board', whose duty it shall be to administer and provide for the enforcement of all the provisions of this act."

It is apparent from the reading of this section that the legislature intended that your honorable body would be permitted to make rules and regulations for the administration of the act but this section does not and cannot empower your body to pass any resolution which in any manner varies the definition of a sale at retail as contained in the act. We respectfully call your attention to the language used by the Supreme Court of the United States upon a subject matter very closely allied to the present, it is said:

"The contention that the delegation of authority to promulgate such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government."

Field v. Clark, 145 U. S. 649.

Further quoting the court said:

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"That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power."

Coopersville Co-Operative Creamery Co. v. Lemon, 163 Fed. Rpr. 145.

It will thus be seen that the legislature has no power by concurrent resolution to amend a law and the State Board of Tax Administration has not been given the right nor could it be given the authority to amend the law. The citations and quotations above are very specific upon this matter.

It is my opinion that the duty rests upon your board to collect a tax in accordance with the definition of the law, that is, a tax upon sales of tangible personal property to the consumer or user. The Supreme Court of the United States in speaking of the application of a tax, used the following language:

"The bill avers that the state officials charged with the administration of the act have failed to demand the tax and do not intend to collect it from the owners of stores in certain lines of business such as furniture dealers. This alleged official dereliction is claimed to be an unconstitutional discrimination in enforcement of the act.

"Under the law of Florida, every unit of the taxpaying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situation require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. State ex rel. Dofnos Corp. v. Lehman et al., 100 Fla. 1401, 131 So. 333. Failure to collect the tax from some whose occupations fall within the provisions of the act cannot excuse the appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated."

Louis K. Liggett Co. v. Lee, 533 S. Ct. Rpr. Page 486.

Requests have been made to your board that the sale of tangible personal property to a manufacturer, which property will be used by him in manufacturing processes shall be exempt from taxation. I am informed that some have made their return and paid the tax under protest.

The law provides in section 22 as follows:

"Appeal; correction of assessment; injunction. If the board after examining the return of a taxpayer determines that the taxpayer is indebted to the state by reason of deficiency of the remittance accompanying such return, the board shall give such taxpayer notice of the intention to levy such deficiency. Such taxpayer may, if he

so desires and serves notice thereof upon the board within twenty days, demand a hearing on the question of the levy of such deficiency. Thereupon the board shall set a time and place for hearing and shall give the taxpayer reasonable notice thereof.

"The taxpayer shall be entitled to appear before the board and be represented by counsel and present testimony and argument. After the hearing the board shall render its decision in writing and, by order, levy any deficiency found by it to be due and payable.

"If any taxpayer is aggrieved by any decision of the board, he shall be required to pay the amount of taxes, interest and/or penalties found due by the board and shall be permitted to bring an action in the circuit court in the county in which the business for the privilege of doing which the tax is levied is carried on, to recover the amount of the taxes alleged to have been unlawfully levied upon him. Such action shall be conducted in accordance with the statutes and rules of procedure concerning actions at law.

"In the event any taxpayer is found entitled to recover any sums paid pursuant to the orders of the board as hereinbefore provided, such sums shall be paid from the general fund of the state on order of the board and warrant of the auditor general.

"No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this act."

The proper proceeding claiming they are exempt or that some of their sales are exempt from taxation is to follow the remedy set forth in the section above quoted. By this method the taxpayer is fully protected for the reason that the court in a similar hearing may order a refund. On the other hand if an exemption is made, which subsequently shall be determined by the court, should not have been made the state has been irreparably injured and has been deprived of a tax which should have been collected. It is conceivable that this question of exemption would not be finally determined by our supreme court before a year, perhaps longer. Under these circumstances I feel that the burden should be placed upon the taxpayer in accordance with the law to get a judicial determination of his right to exemption. Thus the state will come to no harm.

I believe the interpretations of the act as promulgated in the preliminary and supplementary rules will be sustained by our courts and I feel very strongly that the duty is squarely placed upon your shoulders to collect the tax in accordance with the interpretations heretofore made.

It is entirely possible that the individual members of the board would be liable for any damage resulting to the state because of the failure to collect the tax. Such a condition ought not be created because as I have formerly pointed out the taxpayer under the law has a full and complete remedy and is protected while the state may suffer damage running into millions of dollars.

It is my opinion that it is the duty of your body to collect the sales tax uniformly and equally as against all persons to whom it shall apply without exemptions being granted to those clearly coming within the terms of the act.

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Under the terms of the resolution as passed by your body and the legislature there would be no tax collected upon the sale of a plow, a reaper, a drag, a cultivator and other farm implements. Clearly, these implements are to be consumed by the farmer and when sold to him are a sale at retail. Your resolution would further relieve from taxation sales of machinery, tools, dyes, etc., to manufacturing concerns. Again we believe that clearly these articles are sold to the final consumer and not for resale and are taxable.

It could not be said, we believe, that a hammer purchased by a carpenter to be used by him in making a crate or box can in any manner become a component part of a crate or box. He uses the hammer, consumes it and the sale to him is a sale at retail. These illustrations have been used for the purpose of bringing before you my thought as to a proper construction of the law. I trust that you will interpret this law as outlined in the preliminary and supplementary rules and regulations because, I believe, the correct interpretation of the law has been expressed in those rules. The interpretation of the law as expressed in your resolution would be inconsistent with the law which you and I are sworn to uphold.

Yours very truly,
PATRICK H. O'BRIEN,
Attorney General.

MTW:BT/O

SALARIES: COUNTY ROAD COMMISSIONERS: VACANCIES:
One appointed to fill vacancy in the office of the County Road Commissioner takes the same salary as his predecessor until the expiration of the unexpired term.

September 1, 1933.

Mr. Bourke C. Wilmot, Prosecuting Attorney, Gladwin, Michigan.

Dear Sir:—This will acknowledge your letter in which you say:

"A member of the county road commission elected in the fall of 1930 recently died leaving three or four years of his term of office to be fulfilled. A successor was appointed by the Board of Supervisors at its June session this year.

"At the October session of the Board of Supervisors in 1932 the compensation of the County Road Commissioners was reduced. Question: are the county road commissioners such county officers that their compensation cannot be decreased or increased during their term of office and if so does the new member, recently appointed by the Board of Supervisors take the compensation of the member whose place and term he fills or does he come under the salary as fixed at last October's session of the Board?

"I have been requested to get an opinion from your office on this matter".

Section 3982 Mich. C. L. 1929 provides in part:

"The term of office of the first (1st) commissioners elected or appointed in any county under this act, shall commence immediately upon filing such oath of office and bond, and shall continue as

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Walker v. Johnson, 17 App. (D.C.), 144.

When the right of a shareholder in a building association has once been conferred by the articles of association, by-law or usage, it may be revoked by an amendment to the articles, or (when the right is conferred by by-law or usage) by a proper by-law of revocation.

Very truly yours,

PATRICK H. O'BRIEN,

Attorney General.

JER/K*O

RESOLUTION, CONCURRENT: LEGISLATION: Legislation cannot be instituted by concurrent resolution nor may a law be amended by such method.

June 21, 1933.

John K. Stack, Jr., Auditor General, Lansing, Michigan.

Dear Sir:—We have your request for an opinion as to the effect of a concurrent resolution passed by the legislature, extending the time of the operation of Act No. 63, P. A. 1933.

House Concurrent Resolution No. 95, as set forth in the Journal of the House of Representatives of June 16, 1933, provides as follows:

House Concurrent Resolution No. 95.

A concurrent resolution extending the time for the payment of taxes under the provisions of Act No. 63 of the Public Acts of 1933.

Whereas, Millions of dollars of deposits are still tied up in the closed banks of Michigan, thus preventing many taxpayers from taking advantage of the provisions of Act No. 63 of the Public Acts of 1933 in paying their taxes before July 1 of this year without penalties, fees and interest charges; and

Whereas, The farmers of the State of Michigan have not had an opportunity to collect sufficient moneys since the bank holiday with which to pay their taxes under the provisions of said Act No. 63 prior to July 1 of this year without penalties, fees and interest charges; now therefore be it

Resolved by the House of Representatives (the Senate concurring), That the time for the payment of taxes of 1932, without penalties, fees and interest charges, under the provisions of Act No. 63 of the Public Acts of 1933 be extended from July 1, 1933, to November 1, 1933; and be it further

Resolved, That the Auditor General and the County Treasurers of the several counties of this state be and are instructed and directed to accept the payment of taxes of 1932, prior to November 1, 1933, without penalties, fees and interest charges, in accordance with the provisions of said Act No. 63 of the Public Acts of 1933; and be it further

Resolved, That the receipt of the Auditor General or County Treasurer, as the case may be, shall constitute a release of the lien on the land for penalties, fees and interest charges on the taxes so paid; and be it further

Resolved, That a suitable copy of this resolution be sent to the Auditor General and the County Treasurers of the several counties of this state.

With the recommendation that the concurrent resolution be adopted.

The question being on the adoption of the resolution,
Mr. Pack moved to amend the resolution as follows:

1. Amend the second resolving clause, line 2, by striking out the words "instructed and directed", and inserting in lieu thereof the word "requested".

The motion prevailed and the amendment was adopted.

The question then being on the adoption of the resolution,

The resolution was adopted."

The question with which we are presented is:

1. May the legislature, by concurrent resolution, amend an act?
2. If the resolution is not an amendment, may the operation of an act be extended beyond the time specified in the act itself for its operation?

The Constitution of the State of Michigan, Article 5, Section 19, provides as follows:

"All legislation by the legislature shall be by bill and may originate in either house of the legislature."

Section 21 provides as follows:

"No law shall embrace more than one object, which shall be expressed in its title. No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length. No act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house."

Section 22:

"No bill shall be passed or become a law at any regular session of the legislature until it has been printed and in the possession of each house for at least five days. No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message. No bill shall be altered or amended on its passage through either house so as to change its original purpose."

Section 23:

"Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the con-

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currence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal."

Attention is called to the fact that, under the Constitution of 1850, Article 4, Section 19, it was provided that every bill and joint resolution shall be read three times, etc. Under that provision of the Constitution, it was possible for the legislature to originate legislation by a bill or a joint resolution. The Supreme Court of this state on various occasions, under the old constitutional provisions, had occasion to discuss joint resolutions and their effect.

It was determined by the court that a joint resolution was a form of legislation used chiefly for administrative purposes, of a local or temporary character.

Kelly vs. State, 149 Mich. 343;

Olds vs. State Land Commissioner, 134 Mich. 447.

The Constitution of 1908, it will be noted, left out the term "joint resolution" and provided specifically in Section 19, that all legislation shall be by bill.

The construction to be placed upon the Constitution, we believe, is the same as statutory construction which may be summarized as follows:

"It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions." 25 R. C. L., 983.

"Under the legal maxim of construction that express mention of one thing implies the exclusion of other similar things, there is reason in the contention that, the act having expressly named certain liens made subordinate, it by implication excludes others not mentioned, upon the presumption that, having designated some, the legislature designated all it was intended the act should include."

Marshall v. Wabash R. Co., 201 Mich. 167.

Under the rule above quoted, a joint or concurrent resolution cannot be construed to be authorized for the purpose of originating or amending legislation.

Joint Resolution No. 95 was introduced June 16, 1933, and was passed on the same date.

Section 22 of the Constitution above quoted, provides that no bill shall be passed or become a law until it has been printed and in possession of each house for at least five days.

The resolution referred to was passed in less than five days, and clearly is a direct violation of the constitutional provision, if it could be construed as a bill. We concluded that the joint resolution under no section of the Constitution of the State of Michigan can be interpreted as being a bill, and therefore, it follows that this resolution is void and of no effect.

Yours truly,

PATRICK H. O'BRIEN,
Attorney General.

MTW:MK/O

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LEGISLATION: A concurrent resolution is not legislation.

May 20, 1931.

Hon. Gus T. Hartman, House of Representatives, Lansing, Michigan.

My Dear Representative:—I have your letter of May 18th, submitting concurrent resolution No. 26 with the request for my opinion as to whether this resolution is in violation of Section 19, Article V of the Constitution and, in effect, legislation.

The resolution referred to purports to authorize the State Administrative Board to audit and allow certain claims for damages to contractors arising out of the construction of State highways.

Section 19, Article V of the Constitution of 1908 provides—

“All legislation by the legislature shall be by bill and may originate in either house of the legislature.”

Section 1, Article V of the Constitution of 1908 provides—

“No act passed by the legislature shall go into effect until ninety days after the final adjournment of the session * * * except * * * such acts * * * as have been given immediate effect * * *.”

Section 22, Article V of the Constitution of 1908 provides—

“No bill shall be passed or become a law at any regular session of the legislature until it has been printed and in the possession of each house for at least five days. * * *.”

Section 23, Article V of the Constitution of 1908 provides—

“Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal.”

Section 36, Article V of the Constitution of 1908 provides—

“Every bill passed by the legislature shall be presented to the governor before it becomes a law.”

The legislative history of concurrent resolution No. 26, which you submit with your request, indicates that the requirements of the above sections were not complied with; consequently, it would appear that if the resolution referred to is to be considered as “legislation” it would be void.

When a proposed law is introduced in the legislature, it is called a bill. When the bill is passed and becomes the law, it becomes an act.

In the case of *Decher v. Secretary of State*, 209 Michigan, pages 575-8, inclusive, the Supreme Court of this State discusses the difference between an act and a resolution. The court holds—

" * * * the framers of the Constitution, by the use of the word 'act' in article 5, had in mind a statute or law passed with the formality required by the Constitution and approved by the governor."

The court cites with approval cases from other States differentiating between "legislative acts or resolves" having the force of law and resolutions which were not, in effect, legislation.

I am of the opinion that if it must be said that concurrent resolution No. 26 is legislation, it is void, the constitutional requirements for legislation not having been complied with. However, it occurs to me that it was not the intent of the legislature to give this action the force of legislation. The legislature had already, by prior legislation, authorized the State Administrative Board to pass upon claims and specifically to hear and determine claims of persons damaged by reason of negligence in the construction of trunk line highways (Act No. 374 of the Public Acts of 1925). The resolution referred to however is not without effect, although not to be considered as legislation.

I am of the opinion that this resolution may properly be considered as an expression of approval by the legislature of the allowance of a claim to which the resolution refers.

Very truly yours,

PAUL W. VOORHIES,

Attorney General.

ERB:A:O

TOWNSHIP—GAS TAX—COUNTY: Proceeds from gas and weight tax returned to the county are expended by the county road commission and board of supervisors has no authority to order any portion of money expended in any particular township.

May 20, 1931.

Mr. Mort J. Mahan, Newfield Township Clerk, Hesperia, Michigan.

Dear Sir:—We are in receipt of your recent letter in which you state that Newfield Township adopted the township road plan in 1901, and has not since voted to rescind such system. Also, that Oceana County adopted the county road plan in 1930. You request an opinion as to whether Newfield Township is entitled to receive their usual apportionment of weight and gas tax, just as if the county road system had not been adopted by the county of Oceana. You also call attention to the fact that Act 271 P. A. 1917 (Sec. 4004 C. L. 1929) appeared to provide for Newfield township to receive their share of the gas and weight tax money returned to the county by the state.

Act 271 P. A. 1917, amended Section 31 of the county road system, by inserting the following language—

"Provided further, That a county adopting the provisions of this chapter to which money is apportioned and paid under the provisions of Act 302 of the Public Acts of 1915, shall be deemed liable to any township in said county operating under the provisions of the township road plan as aforesaid for such amount as will represent the proportionate share of said township of the money thus apportioned and paid. It shall be the duty of the board of supervisors to

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The question here involved is, can wife who still retains the attributes possessed under the common law, take the acknowledgment of her husband? In Corpus Juris, Volume 1, page 808, we find the following law:

"Where the taking of an acknowledgment is deemed a ministerial act, an officer who is not beneficially interested in the conveyance will not be disqualified by reason of relationship to one of the parties therein whether by consanguinity or affinity, and even the husband of a grantee or obligee may take the acknowledgment, unless he has a beneficial interest in the transaction. But it has been held that, while an acknowledgment before an officer related to one of the parties is not per se void, yet it is open to attack, and the court will lend a ready ear to evidence of undue advantage, fraud, or oppression arising out of such relationship."

I believe that the situation is one to which the remarks of the Supreme Court in the case of Timm v. Cass Circuit Judge, 192 Mich. 508, could be applied. In that case an objection was made that the affidavit for a writ was sworn to before the wife of the attorney for the plaintiff, it being contended that the statute prohibiting attorneys from acting as notaries in causes in which they are professionally engaged, by analogy prohibits their wives from so doing, by reason of the confidential relation existing between them. The language of the court, in disposing of this contention, was as follows:

"We do not think there is any merit in this point. The statute has conferred the authority on her to act as notary public, and unless that right is restricted, as in case of attorneys acting as such in their own cases, we see no legal reason why she may not act in such cases, even though she be the wife of one of the attorneys interested in the case. The question is an appropriate one for the consideration of the legislature."

While we find no cases bearing directly upon your question, we conclude that there is no apparent reason why a married woman cannot take the acknowledgment of her husband, provided she is not beneficially interested in the conveyance.

Very truly yours,

WILBER M. BRUCKER,

Attorney General.

LCT:GH/O

CONSTITUTIONAL LAW: The Legislature may not by concurrent resolution give retroactive effect to an act.

An attempt to give retroactive effect to an act providing increases in salary in violation of Section 3, Article XVI of the State Constitution.

April 12, 1929.

Hon. O. B. Fuller, Auditor General, Lansing, Michigan.

Dear Sir:—I have before me for reply your letter of the 8th, from which it appears that Senate Enrolled Act No. 2 of the session of 1929, was approved by the Governor on February 7, 1929, and given effect as of that date. It also appears that House Resolution No. 13 was adopted

by the House on March 27, 1929, and by the Senate on April 3, 1929. The Enrolled Act, which is now Act No. 3 of the Public Acts of the present session of the legislature, fixes the compensation of members of the legislature and of the officers and employees thereof, and repeals various other acts. The Journal of the House proceedings of March 27, 1929, shows the following Resolution, denominated "House Concurrent Resolution No. 13", introduced by Mr. Bartlett and duly adopted:

"Whereas, It has heretofore been the custom to pay compensation to the employes of the legislature up to and including the day of final adjournment; and

"Whereas, the present legislature departed from this custom by its passage of Act No. 3 of the Public Acts of 1929, under the terms of which said employes received in lieu thereof an increase in per diem compensation; and

"Whereas, The provisions of said act apply to the employes of the present legislature, thereby shortening the period for which they receive compensation but the increased rate of their per diem compensation did not take effect until February 8, 1929; Therefore, be it

"RESOLVED, By the House of Representatives (the Senate concurring) That it is the consensus of opinion that said employes should be compensated from the time of entering upon their respective duties at the rate provided under the provisions of said act; and, Be it further

"Resolved, That the Speaker and Clerk of the House of Representatives, and the President and Secretary of the Senate are hereby authorized and directed to draw vouchers for all employes of the Legislature upon their respective payrolls, prior to February 8, 1929, in an amount equal to the difference between the sum each of said employes would have received had said act been in effect on and after January 1, 1929, and the sum each of said employes actually received."

You state in your letter that you are in doubt "as to whether the auditor general has authority to issue a warrant in payment of the amount fixed by Senate Enrolled Act No. 2, for the period prior to the taking effect of the above mentioned act", and you request an opinion on the matter.

We are met on the threshold of this discussion by two questions: (1) May the legislature, by concurrent resolution, give the act retroactive effect to January 2, 1929? (2) If so, does such retroactive effect violate Section 3 of Article XVI of the State Constitution?

Consideration of the first question requires, perhaps, that we inquire into the nature of a "concurrent resolution" and its proper functions. In *Kelley v. Secretary of State*, 149 Mich. 343, a mandamus was sought to compel the Secretary of State to submit a question to the vote of the people, as provided by "concurrent resolution No. 1, Pub. Acts 1907". The question arose as to whether the resolution was a bill or a joint resolution within the meaning of Section 19 of Article IV of the then existing Constitution, reading as follows:

"No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each House."

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The court said:

"This language, according to sound principles of constitutional construction, applies to all laws which might be effected by the passage of a bill or the adoption of a joint resolution. Otherwise, legislators might, at their pleasure, disregard its prohibition by calling the bill or joint resolution by some other name. It is therefore unimportant that the resolution in question is called a concurrent resolution. It is none the less a bill or joint resolution within the meaning of section 19 of article 4, if, assuming it to be valid, it is a law which might have been effected by the passage of a bill, or the adoption of a joint resolution."

A "joint resolution" was described in *Olds v. State Land Commissioner*, 134 Mich. 447, to be:

"A form of legislation which is in frequent use in this country, chiefly for administrative purposes of a local or temporary character."

Citing Cushing, *Law & Practice of Legislative Assemblies*, Sec. 2403.

The distinction between a joint resolution, a concurrent resolution and a bill is not at all definite. In the Constitution of 1850, it was provided that, every bill and "concurrent resolution" should be presented to the Governor before it became a law. It was also provided that every bill and "joint resolution" should be read three times in each house before the final passage thereof, and that no bill or "joint resolution" should become a law without the concurrence of a majority of all the members elected to each house. In the Constitution of 1908, all reference to resolutions seems to have been eliminated. It is there provided that every "bill" passed by the legislature shall be presented to the Governor before it becomes a law. It is also provided that no "bill" shall be passed until it has been printed and in the possession of each house for at least five days, and no "bill" shall become a law without the concurrence of a majority of all the members elected to each house. A provision in the 1850 Constitution that "Bills may originate in either house of the legislature" as in the later Constitution changed to read, "all legislation by the legislature shall be by bill and may originate in either house of the legislature".

From the Proceedings & Debates, we learn that this change was made "to prevent legislation by concurrent resolution of the two houses". Additional comment made in the Proceedings & Debates on this subject is as follows:

"All legislation must be by bill under the revision, thus insuring greater publicity. Legislative action by joint resolution was designed, chiefly, for administrative purposes of a local and temporary character. The uses of the joint resolution have been unduly extended, and it was deemed wise to forestall the abuses practiced under it by the foregoing section."

It seems to me that, from a consideration of the above, the tendency has been to eliminate the distinction between concurrent and joint reso-

lutions, and to provide that legislation shall all be confined to bills, and that matters of a "local or temporary character" may be covered by resolutions.

The resolution here under consideration is one which by its terms changes the effective date of an act previously adopted and given immediate effect. The privilege of giving immediate effect to acts is embraced in an exception to the general rule as to the effective date of all acts, the rule and the exception being part of Section 21 of Article V of the Constitution and reading as follows:

"Sec. 21. * * * No act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house."

The framers of the Constitution therefore announced a general rule subject to one exception. May we now say that an additional exception may be read into this constitutional provision to the effect that the legislature may by vote or resolution prescribe retroactive effect to an act? The rule of "expressio unius est exclusio alterum" would seem to have appropriate application in this instance.

"It is a general principle of interpretation that the mention of one thing implies the exclusion of another thing."

25 R. C. L. 981.

"An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication."

Lewis' Sutherland, 2d Ed. Sec. 494.

As applied to exceptions this rule is stated as follows:

"It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions."

25 R. C. L. 983.

Marshall v. Wabash, 201 Mich. 167.

Taylor v. Michigan Public Utilities Commission, 217 Mich. 400.

This rule is of ancient origin but unvarying adherence to it by the courts and the construction of constitutions and statutes has definitely grounded it as one of the fundamental maxims to be applied in statutory interpretation. If this rule is to be applied to the instant case, as I believe that it should, we find that the Constitution decrees that all acts shall take effect at the expiration of ninety days from the end of the session at which the same is passed, with a single exception that immediate effect to certain acts may be given by a two-thirds vote of the members of each house. No other exceptions are stated and none may be implied.

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Moreover, to hold otherwise would be in effect to sanction a possible circumvention of executive authority. The Governor may approve a bill which has been sent to him with a legislative order, giving it immediate effect, or the bill may be one to take effect in the regular course of events. Subsequent to the executive approval the legislature might choose by concurrent resolution, to change the effective date so as to make it retroactive. I do not believe it is the intention of the Constitution that such a situation should be possible. Assuming the concurrent resolution therefore to be in proper form, it fails of its purpose, there being no legal authority authorizing its adoption.

The second question is likewise a serious one and is fraught with considerable doubt. Section 3 of Article XVI of the State Constitution reads in part as follows:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employee or contractor after the service has been rendered or the contract entered into."

The immediate question is therefore,—whether to give retroactive effect to the act in question would likewise have the effect of giving extra compensation for services already performed. What constitutes extra compensation has been several times judicially announced. In *Attorney General v. Connolly*, 193 Mich. 499, the court said:

"Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered." Taking this definition from *Mahon v. Board of Education*, 171 N. Y. 263, 266 (63 N. E. 1107, 1108, 89 Am. St. Rep. 810).

"'Extra compensation', within the meaning of Article XXXIV of the amendment to the Constitution, prohibiting the General Assembly or any county, city, etc., to grant any extra compensation to any public officer, is a compensation in addition to, in excess of, or larger than the compensation prescribed by law or settled by contract; one the payee is not entitled by law to demand, nor the payer obliged to pay."

McGovern v. Mitchell, 63 Atl. 433, 78 Conn. 536.

At the time that the employees of the present legislature assumed their duties, their compensation had been fixed by previous acts. (Secs. 19, 20 and 21, Comp. Laws 1915, as amended by Act No. 367, Pub. Acts 1917; Act. No. 1, Pub. Acts 1919, as amended by Act No. 53, Pub. Acts 1923.) Between the date on which their duties commenced,—January 2, 1929, and February 7, 1929,—their compensation was, therefore, governed by the then existing law. On the latter date the new act became effective, increasing the compensation of these employees thenceforth. The resolution, however, attempts to set its effect back so that the act would become operative on January 2, 1929. This, it seems to me, would give the employees compensation "over and above that fixed * * * by law when the services were rendered".

Cases in point are not plentiful, but the few cases which have turned on analogous situations seems to indicate that, as long as changes in compensation by way of increase are made to operate prospectively and

not retrospectively, they are valid and not in conflict with constitutional inhibitions against the granting of extra compensation after the services have been performed. In *Attorney General v. Detroit Board of Education*, 225 Mich. 237, it was held that the action of the board of education in cancelling existing contracts by mutual consent, and entering into new ones providing for additional compensation for the remainder of the school year, was not a violation of Section 3 of Article XVI, since the services under the new contracts had not been fully rendered. It appeared that, in order to overcome an increasing loss in the teaching force, the board proposed that the existing contracts should be cancelled and new contracts entered into, providing for \$300 additional compensation on certain conditions. The court said:

"At that time the services contracted for had not been fully rendered. Three months of the school period remained. For the services to be rendered during the latter period new contracts providing for increased compensation were entered into. *There could be no additional compensation allowed for services performed under the original contracts*, but there is no constitutional obstacle in the way of cancelling the contracts or changing them at any time and allowing an increase in salary for the balance of the term. *The only thing the board may not do is to grant additional compensation after the services have been rendered.* The services affected by the resolution of March 25, 1920, had not been rendered at the time of its passage. It purports to cover services to be rendered. * * * As the additional compensation was for *services to be performed* under new contracts for the balance of the school year, we think it does not violate the provision of the Constitution which prohibits a municipal authority from granting additional compensation for services after they have been rendered."

In *Attorney General v. Detroit Board of Education*, 154 Mich. 584, an increase in salary for the superintendent of public schools was upheld as not being in violation of the then Constitution, because, as was stated by the court,—"*the increase of salary looks to the future and not to the past*". In that case the increase was granted for the remainder of the term for which he was elected.

I am therefore of the opinion that the legislature may not, by concurrent resolution or otherwise, give retroactive effect to Act No. 3, Public Acts of 1929.

Yours very truly,
WILBER M. BRUCKER,
Attorney General.

CR:GH/O